

**EU Anti-Discrimination Law and the Imperfect Market**

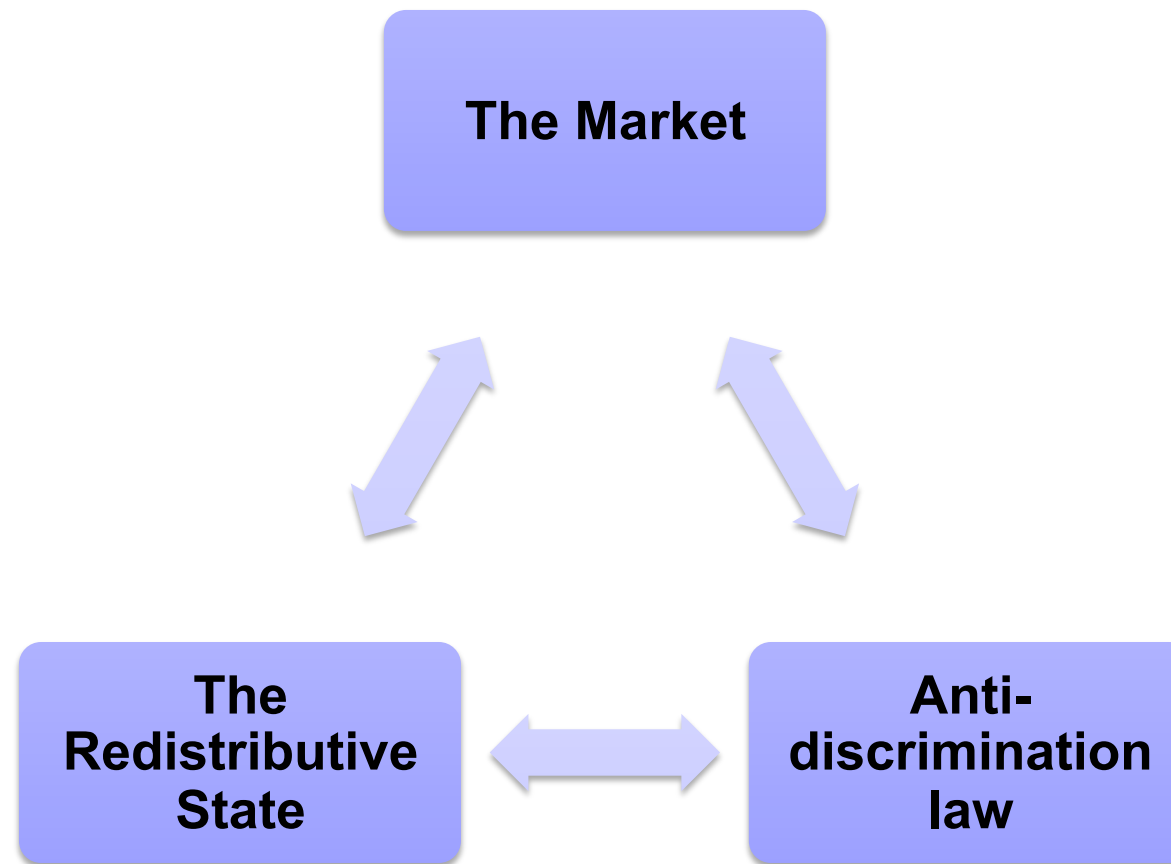


# EU Anti-Discrimination Law and the Imperfect Market

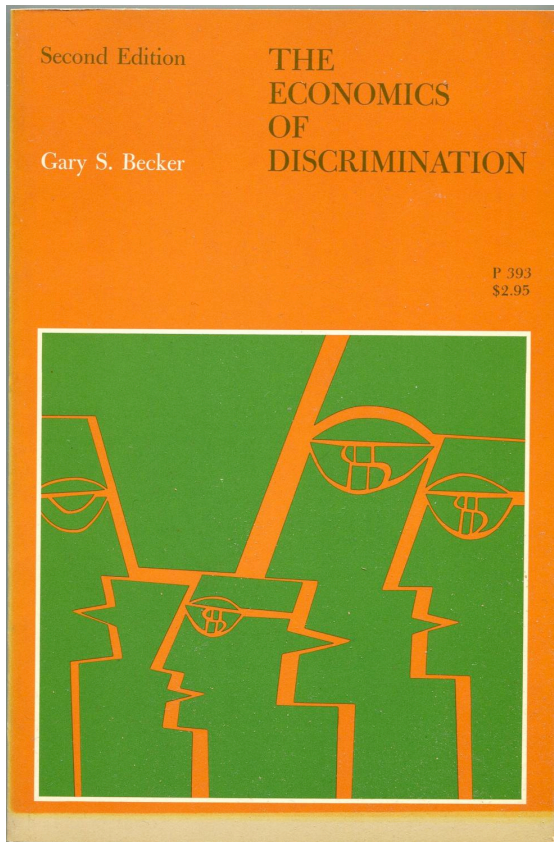
Olivier De Schutter

EELN Legal Seminar - Brussels – 1 December 2017

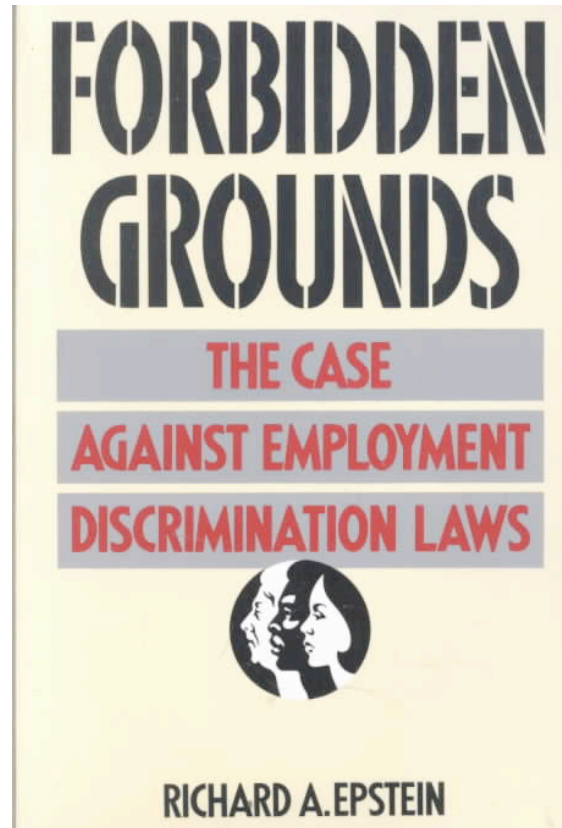




## Anti-discrimination law as redundant? The thesis of the market as a tool to « filter out » irrational prejudice



**Gary Becker (1957)**

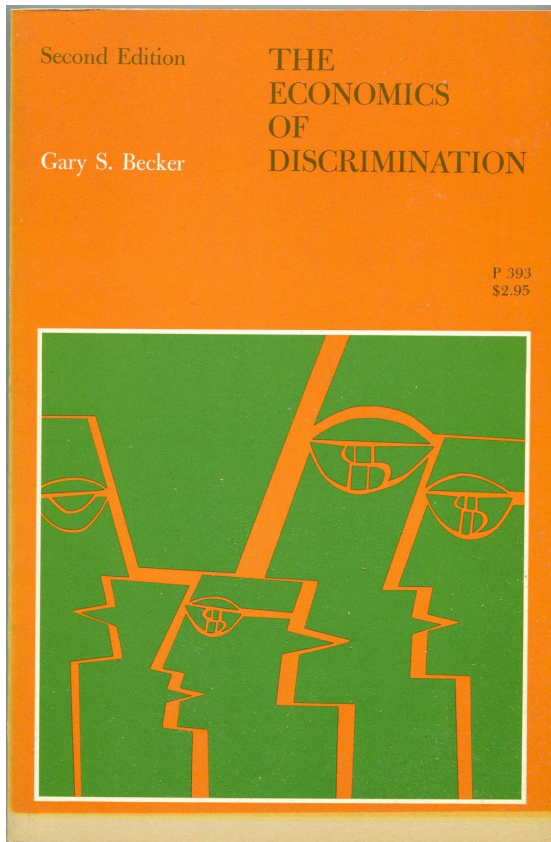


**Richard Epstein (1992)**

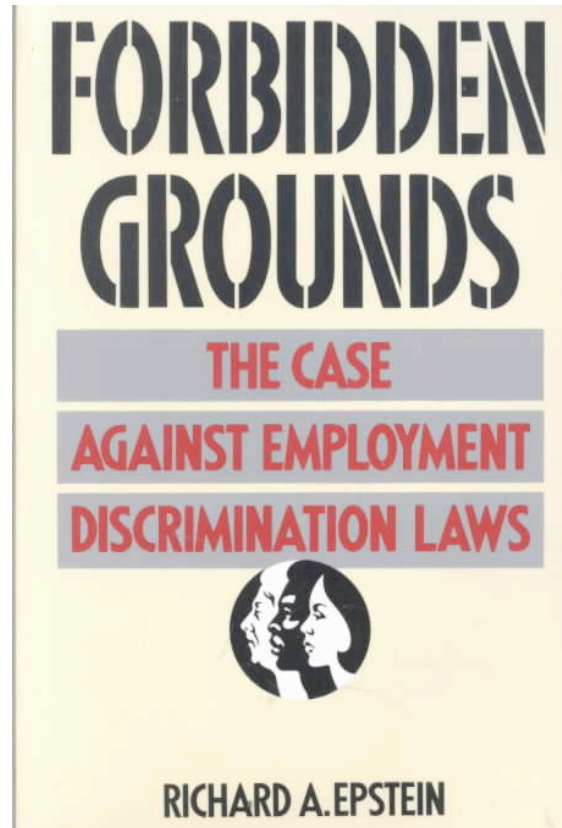
« ... competitive markets drive out inefficient forms of behavior, with discrimination as with anything else. The appropriate strategy in all cases, therefore, is to open up markets to new entry as quickly as possible, to eliminate as many of the impediments on the employment relationship – unemployment taxation, the minimum wage, antidiscrimination law, most health and safety regulation - ... »



**Anti-discrimination law as redundant? The thesis of the market as a tool to « filter out » irrational prejudice**



**Gary Becker (1957)**



**Richard Epstein (1992)**

« ... and to allow employers and employees to work their separate peace on mutually agreeable terms. » (Richard A. Epstein, 'Standing Firm, on Forbidden Grounds', 31 *San Diego Law Review* 1 (1994)).

**AG Poiares Maduro, Opinion of 12 March 2008 Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV*, para. 18:**

The contention made by Mr Feryn that customers would be unfavourably disposed towards employees of a certain ethnic origin is wholly irrelevant to the question whether the Directive applies. Even if that contention were true, it would only illustrate that ‘markets will not cure discrimination’ (Sunstein, C., ‘Why markets don’t stop discrimination’, in: *Free markets and social justice*, Oxford University Press, Oxford, 1997, p. 165) and that regulatory intervention is essential. Moreover, the adoption of regulatory measures at Community level helps to solve a collective action problem for employers by preventing the distortion of competition that – precisely because of that market failure – could arise if different standards of protection against discrimination existed at national level.

□  
FREE  
MARKETS  
and  
SOCIAL  
JUSTICE  
□

CASS R. SUNSTEIN

Oxford University Press  
New York Oxford



### **Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV*, judgment of 10 July 2008:**

- « an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market. » (para. 28)
- « public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment. » (para. 34)

- **Judgment of 14 March 2017, Case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV***
- **Legitimate aim?** ‘the desire to *display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality* must be considered legitimate’ (para. 37)
- **Appropriate?** ‘the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner’ (para. 40)
- **Necessary?** ‘what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.’ (para. 42)

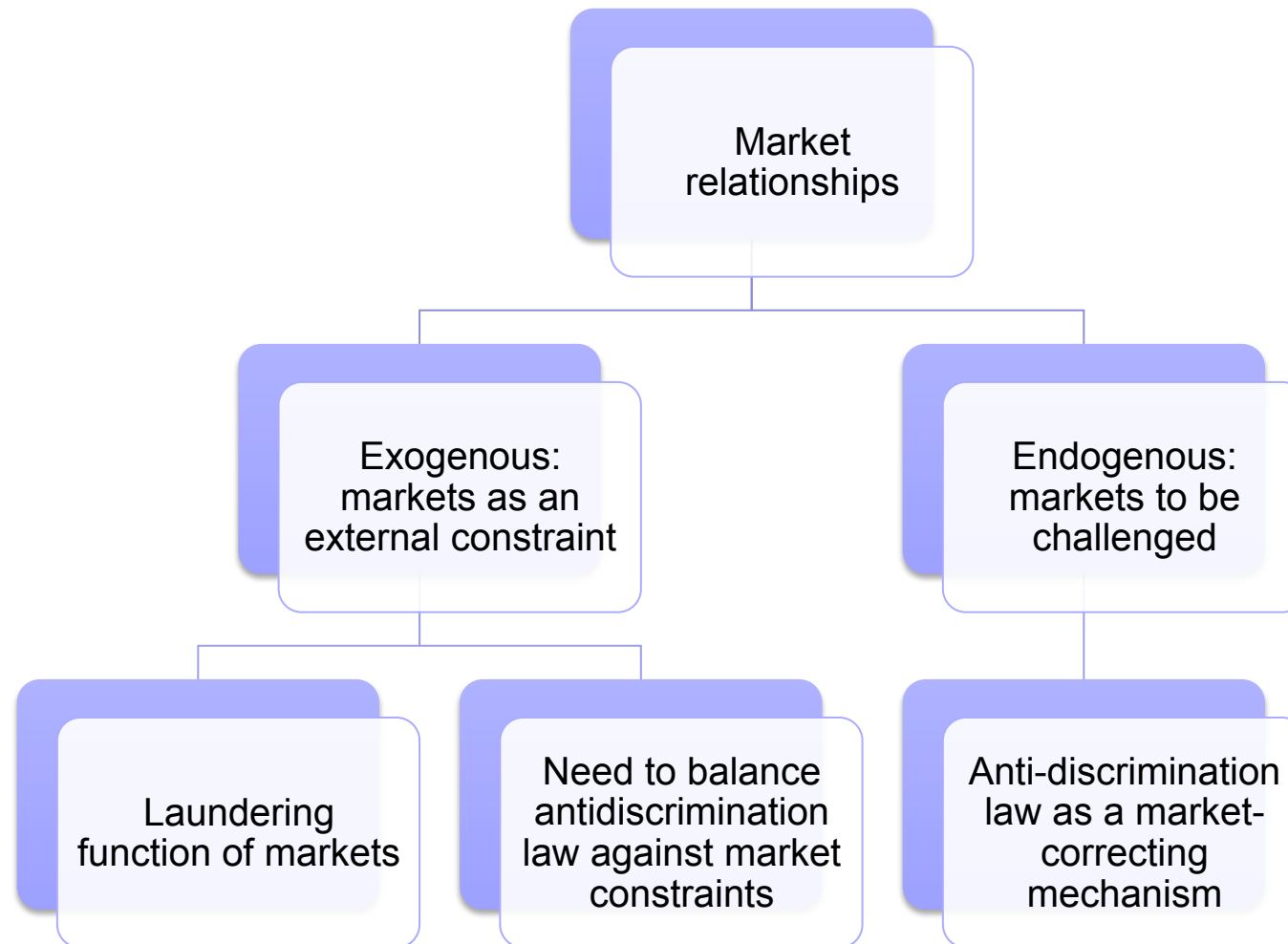
- **Judgment of 14 March 2017, Case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV***
- ‘...it is for the referring court to ascertain whether, *taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden*, it would have been possible for G4S, faced with (the refusal of Ms Achbita to remove her headscarf), to offer her a post not involving any visual contact with those customers, instead of dismissing her. It is for the referring court, having regard to all the material in the file, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary” (para. 43).
- **See AG J. Kokott, Opinion of 31 May 2016:** ‘An undertaking can and must, by definition, take into careful account the preferences and wishes of its business partners, in particular its customers, in its business practices. It would otherwise be unable to sustain its presence on the market. It nonetheless cannot pander blindly and uncritically to each and every demand and desire expressed by a third party.’ (para. 90)



- **Judgment of 14 March 2017, Case C-188/15, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA* (referral from the French Court of Cassation):**
- Ms Bougnaoui recruited in July 2008, dismissed in June 2009 after a client complained that the wearing of the headscarf “had upset a number of its employees”
- **Genuine occupational requirement** : ‘where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’ (art. 4(1), Dir. 2000/78)

- **Judgment of 14 March 2017, Case C-188/15, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA* (referral from the French Court of Cassation):**
- « ...the concept of a ‘genuine and determining occupational requirement’, within the meaning of that provision, refers to a requirement that is **objectively dictated** by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover **subjective considerations**, such as the willingness of the employer to take account of the particular wishes of the customer » (para. 40)
- “Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.” (para. 41)

- **Eur. Ct. HR (4th sect.), *Eweida, Chaplin, Ladele and McFarlane v. United Kingdom*, judgment of 15 Jan. 2013 – the case of Eweida.**
- “...the Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms Eweida’s desire to manifest her religious belief. ..., this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer’s wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida’s cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways’ brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance” (para. 94)

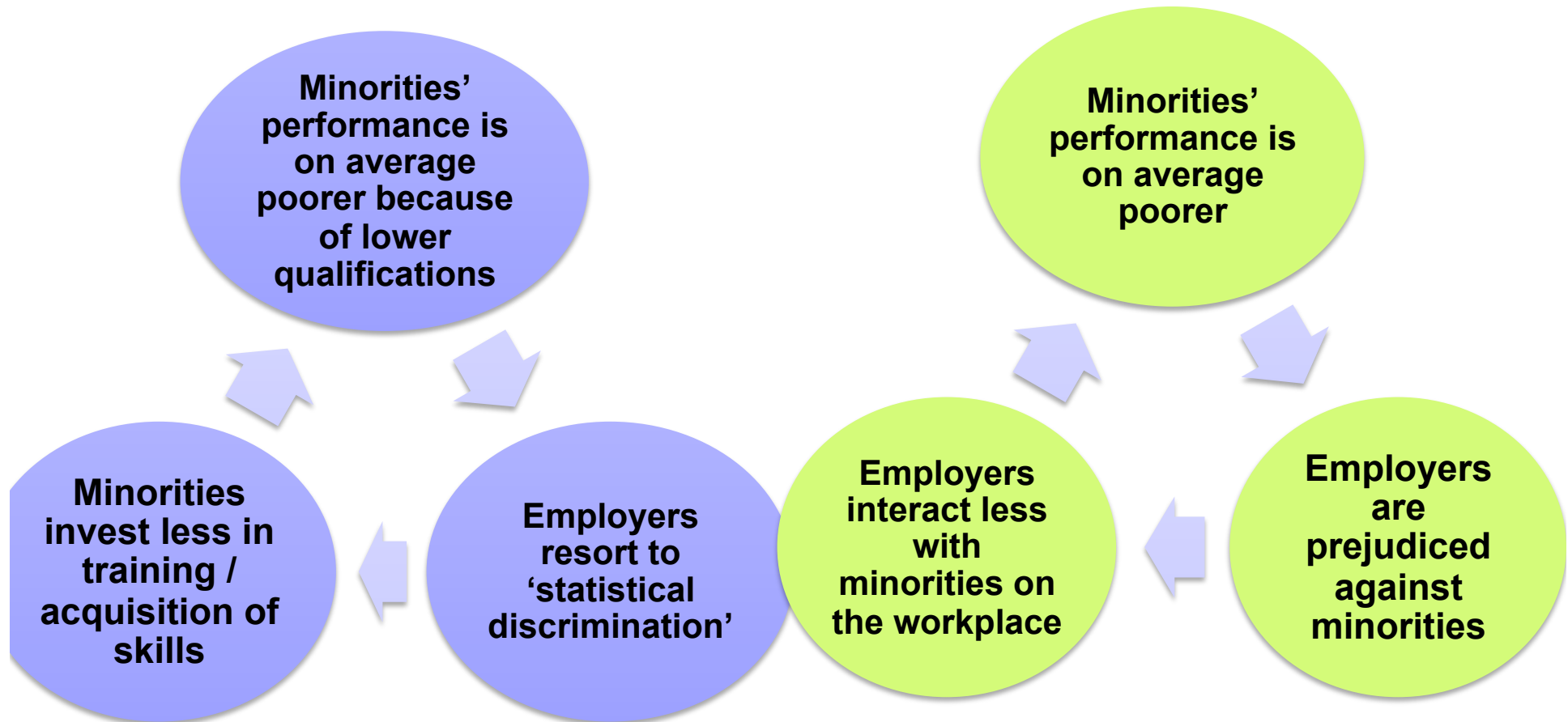


**Becker / Epstein**

***Achbita, Eweida***

***Feryn, Bougnaoui***

**“Why markets don’t stop discrimination” (II): stereotypes as an economizing device ... and as a self-fulfilling prophecy : two vicious cycles**



**Arrow-Akerlof model**

**Glover-Pallais-Pariente model**



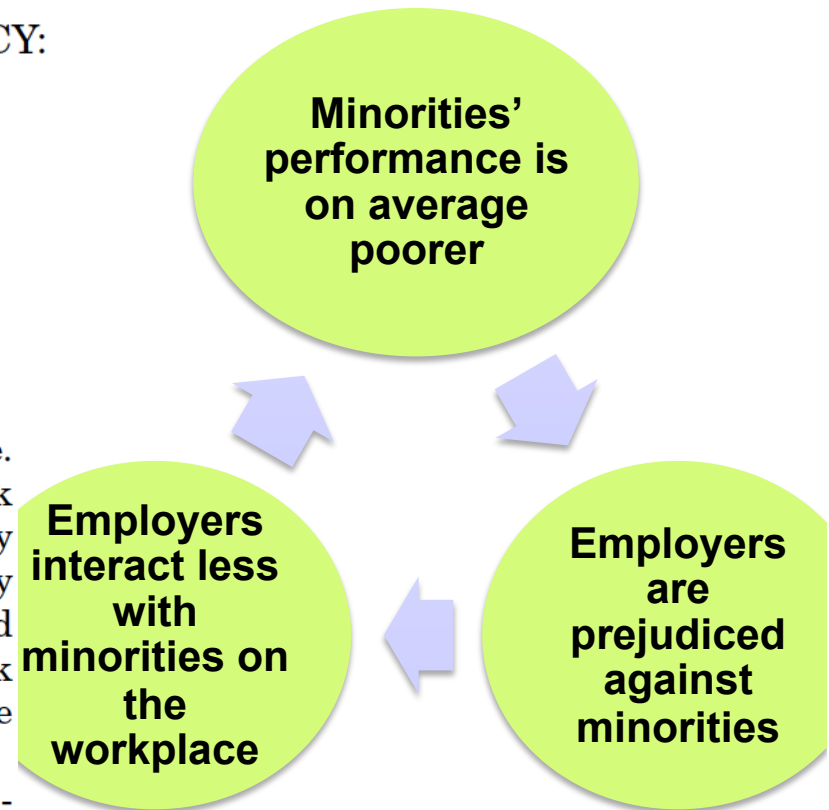
## **“Why markets don’t stop discrimination” (II): stereotypes as an economizing device ... and as a self-fulfilling prophecy : two vicious cycles**

### **DISCRIMINATION AS A SELF-FULFILLING PROPHECY: EVIDENCE FROM FRENCH GROCERY STORES\***

DYLAN GLOVER  
AMANDA PALLAIS  
WILLIAM PARIENTE

We find that manager bias leads minorities to perform worse. Minorities are more likely to be absent when scheduled to work with more biased managers. When they do come to work, they spend less time at the store: specifically, they are much less likely to stay after their scheduled shift ends. While workers are allowed to leave when their shift ends, managers can ask them to work late. Because workers are paid based on time worked, we estimate that minorities earn 2.5% less as a result of manager bias.

Minorities also scan items more slowly and take more time between customers when working with biased managers. Throughout our analyses, none of the differential effects of working with more biased managers are explained by the other manager characteristics we have, including the managers’ own minority status.

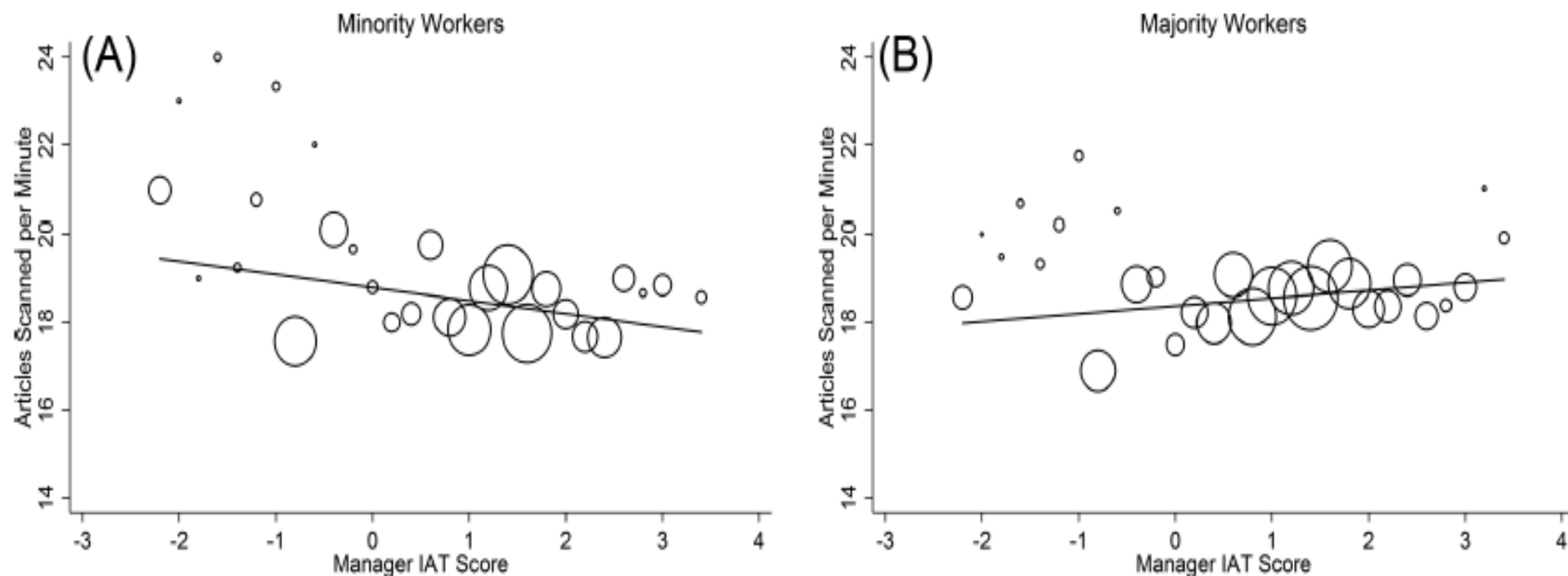


**Glover-Pallais-Pariente model**

## **“Why markets don’t stop discrimination” (II): stereotypes as an economizing device ... and as a self-fulfilling prophecy : two vicious cycles**

DISCRIMINATION AS A SELF-FULFILLING PROPHECY:  
EVIDENCE FROM FRENCH GROCERY STORES\*

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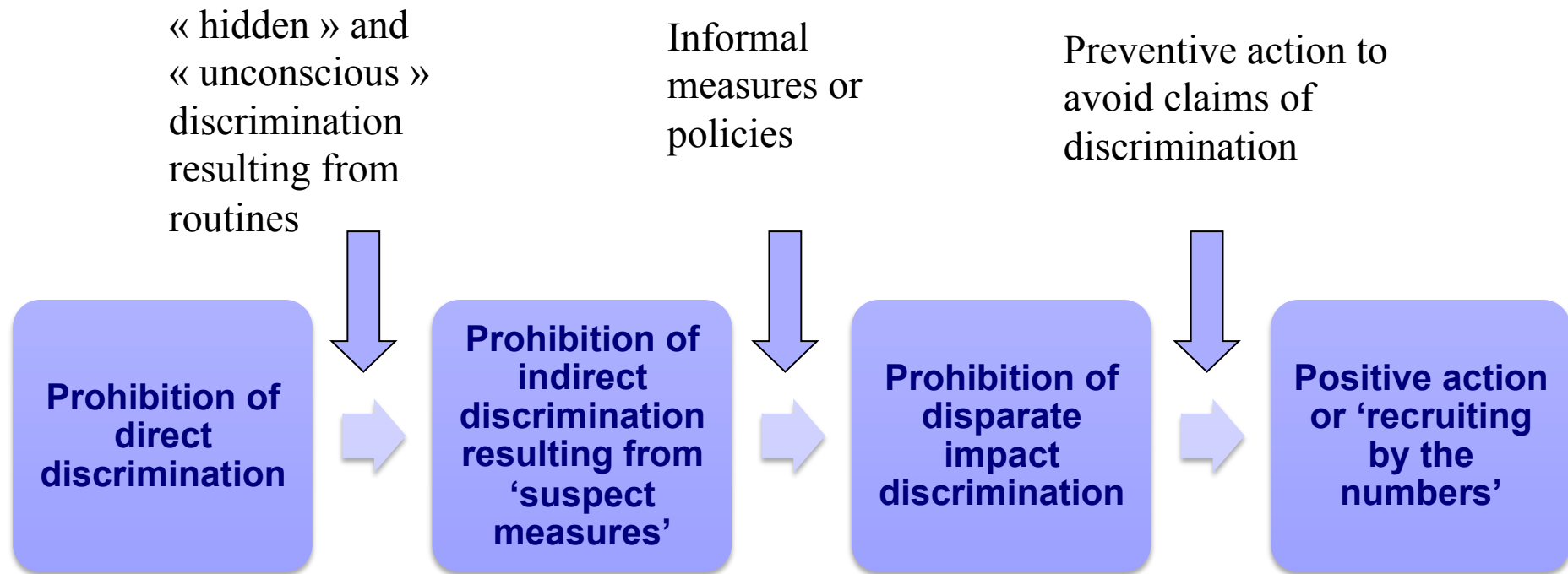
**The mirror thesis to the “redundancy of anti-discrimination law” thesis: equal treatment as a substitute for social justice**

Determining the Impact of Federal Antidiscrimination  
Policy on the Economic Status of Blacks: A Study  
of South Carolina

By JAMES J. HECKMAN AND BROOK S. PAYNER\*

*The American Economic Review*, Vol. 79, No. 1 (Mar., 1989), 138-177.

## The stages of anti-discrimination law – from discrimination as a ‘sin’ to equality of results



## Two understandings of indirect discrimination

- **Indirect discrimination as a suspect measure:** ‘shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’
- **Indirect discrimination as disparate impact (cf Preamble, 15th recital of Directive 2000/78) :** ‘The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.’



**Indirect discrimination as « disparate impact » discrimination:**

**Preferences and qualifications**



**Reference group A (12 Catholics) / B (6 Protestants)**



**Selection through « neutral » procedures**

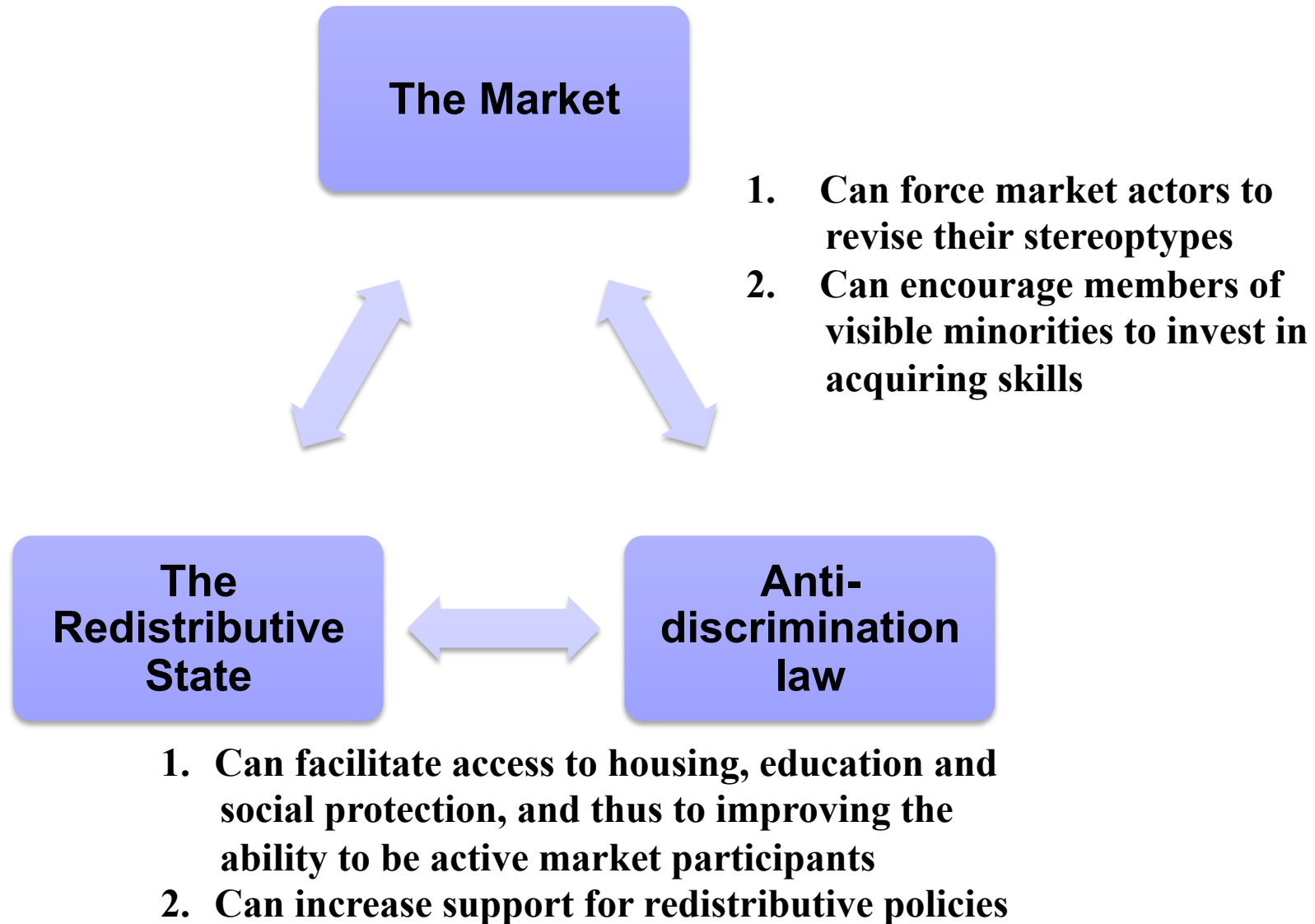


**Result:**

**Arrival group : A' (4 Catholics)/B' (1 Protestant)**

- **Presumption of discrimination against members of group B (Protestants) if**  
$$A/B < A'/B'$$

<p><b>‘SUSPECT’ MEASURE BECAUSE IMPOSING A SPECIFIC DISADVANTAGE (dir. 2000/43 and 2000/78, and dir. 2006/54)</b></p>	<p><b>MEASURE HAVING A DISPROPORTIONATE IMPACT AS REVEALED BY STATISTICS (dir. 97/80)</b></p>
<p>Allows to challenge “suspect” measures (eg, place of residence in strongly geographically segregated societies), but does not allow to challenge measures that are apparently neutral even where there is a disproportionate impact</p>	<p>Allows to challenge measures with a disproportionate impact, including where this can only be shown by statistics (<b>informal measures</b> such as psycho-technical tests, interviews, ...; or <b>received criteria</b> such as eg height requirement or requirement of a driving license)</p>
<p>The victim is not required to present statistics</p>	<p>Requires 1° classification into different groups ; 2° access to statistics: 3° assessment of the acceptable impact</p>



## Three limits to what anti-discrimination law may achieve –

### I: Can anti-discrimination law eliminate negative stereotypes?

#### Will Affirmative-Action Policies Eliminate Negative Stereotypes?

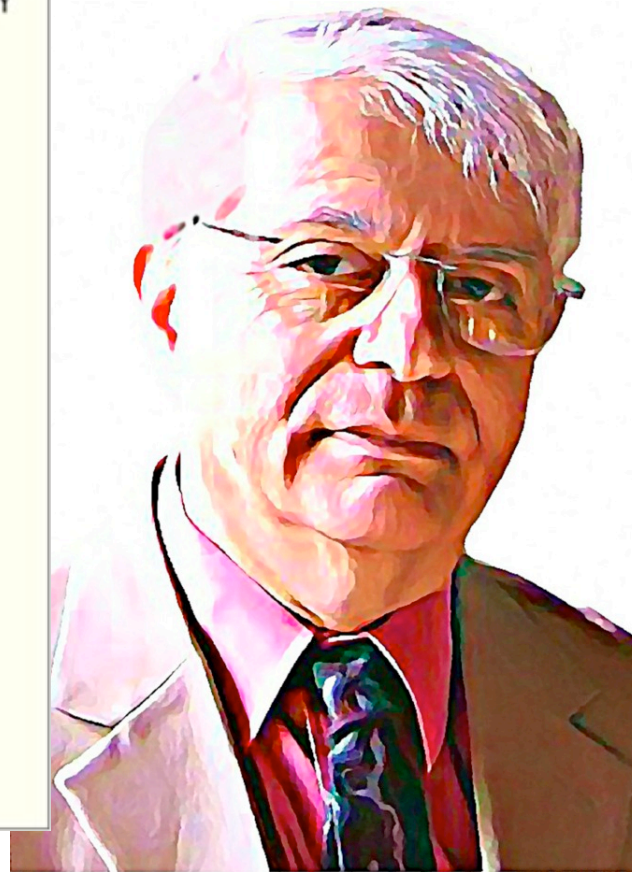
By STEPHEN COATE AND GLENN C. LOURY\*

*The American Economic Review*, Vol. 83, No. 5 (Dec., 1993), 1220-1240.

In our model, an employer who harbors negative stereotypes against some group is less likely to assign workers belonging to that group to the more highly rewarded jobs within the firm. This lowers the expected return for these workers on investments which make them more productive in such jobs. For this reason it is possible that employers' negative beliefs about a group are confirmed in equilibrium, even when all groups are *ex ante* identical. In this sense, negative stereotypes constitute a "self-fulfilling prophecy." This framework is a natural one for thinking about the problem because it allows employers' beliefs to be determined by their experience, while making that experience the result of the endogenous choices of workers. If affirmative action is to have any chance of changing employers' negative beliefs, these beliefs must be responsive to new evidence. Moreover, it is also necessary that minority workers respond to the enhanced opportunities created by affirmative action by producing evidence of greater productivity.

Three limits to what anti-discrimination law may achieve –

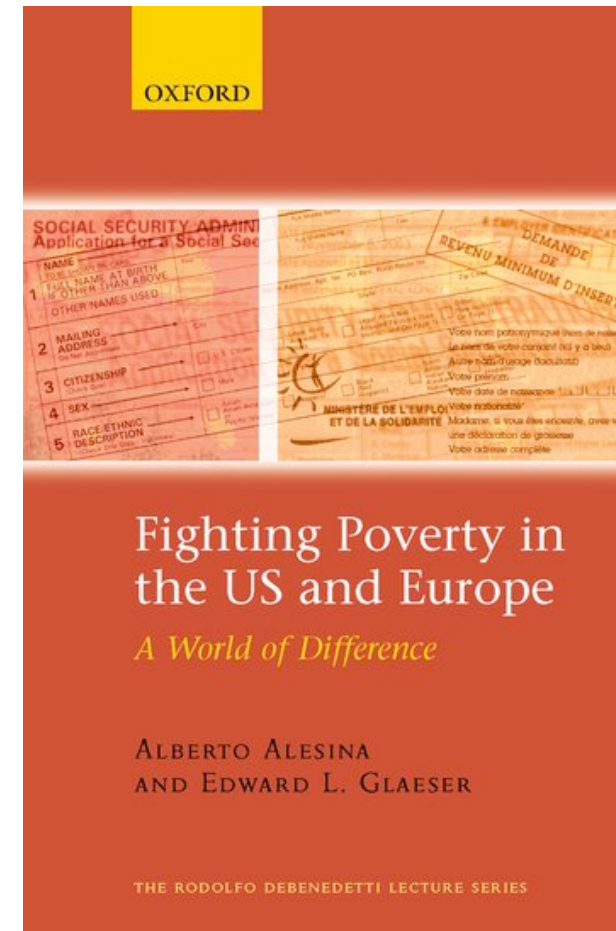
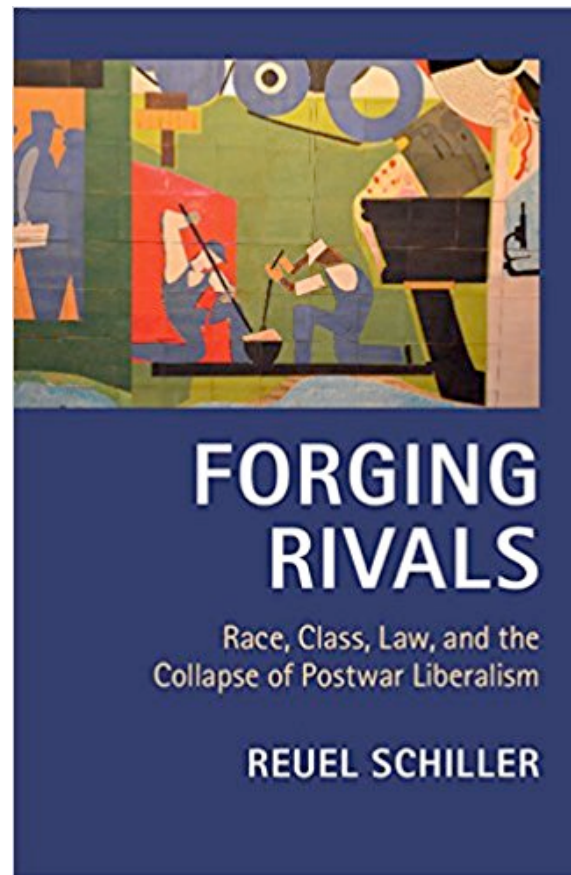
II: Can anti-discrimination law ensure investment in “human capital”?





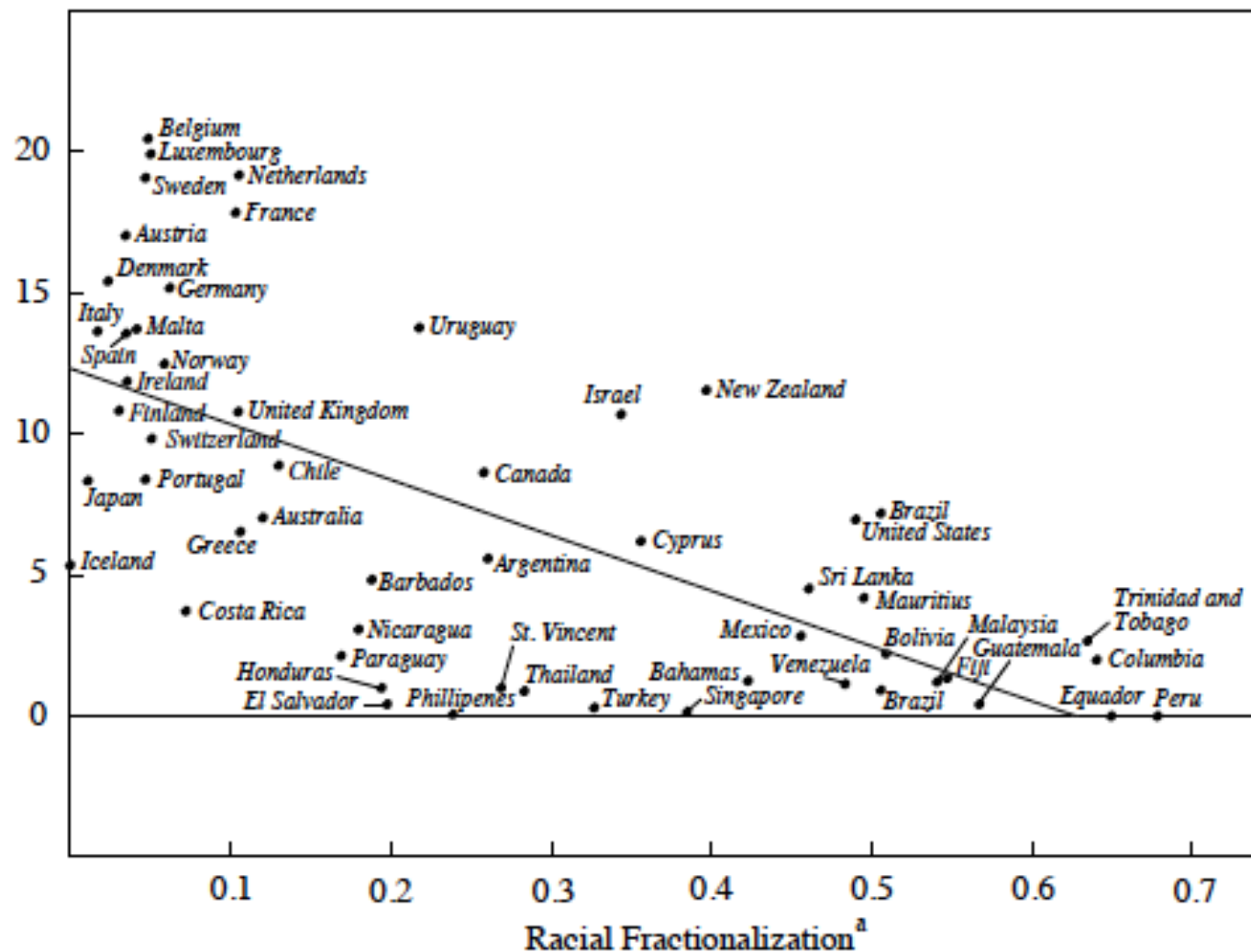
Three limits to what anti-discrimination law may achieve –

III: Shall strong anti-discrimination policies lead to greater support for redistributive welfare policies ?



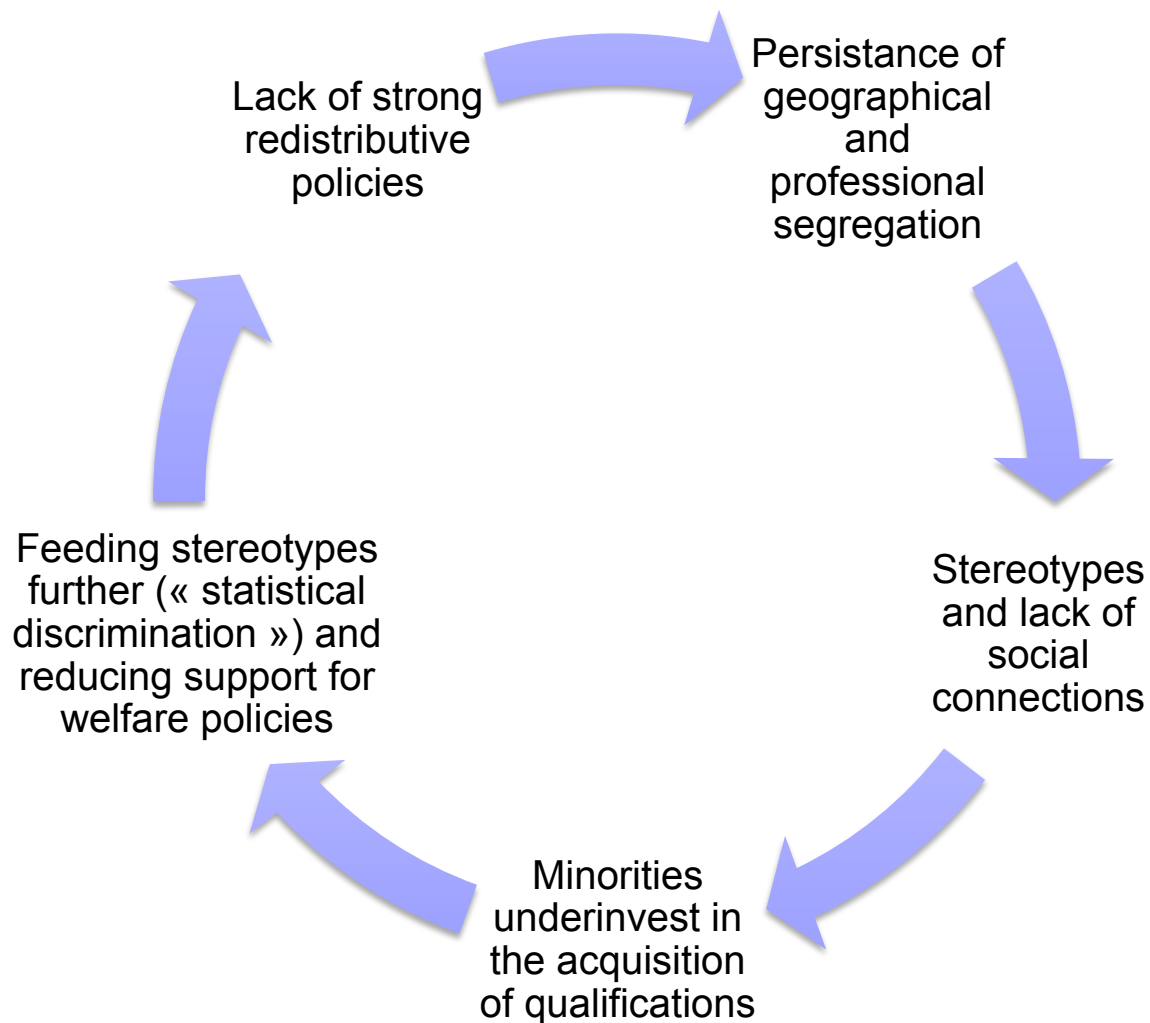
## Relationship between social spending and racial fractionalization

Social spending (percent of GDP)



Source: Alberto Alesina, Edward L. Glaeser, and Bruce Sacerdote, NBER Working Paper No. 8524(2001)

## The role of anti-discrimination law in breaking the vicious cycle



## The role of anti-discrimination law in breaking the vicious cycle ...

Social good	Baseline criterion for allocation
Education	Academic merit and need
Housing	Need (or waiting time)
Social protection	Need (and increasingly compliance with conditions – « activation »)
Healthcare	Need
Employment	Merit (qualifications)

...by redefining merit in order to ensure the right to work.

- **Article 5 Dir. 2000/78/EC - Reasonable accommodation for disabled persons**
- In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.
- **Judgment of 14 March 2017, Case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV***
- **Comp. Opinion of AG J. Kokott, 31 May 2016:**
- “109. However, militating against such an approach, under which each case is individually assessed and analysed from the point of view of its potential to give rise to specific conflict, is, once again, the fact that it would be a far less appropriate means of implementing the company policy of religious and ideological neutrality. For, even if a female employee is sent to work as a receptionist with a G4S customer that tolerates the Islamic headscarf, clothing such as that worn by Ms Achbita will continue to undermine the policy of neutrality pursued by her own employer, G4S. »







