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Why a racial priority for COVID-19 vaccine distribution poses problems

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The federal government has been flirting — and in some cases more than flirting — with a policy that is both unconstitutional and wrong: distributing COVID-19 vaccines on the basis of race. It's time to close the door on this bad idea.

Already, the Veterans Administration has adopted explicit preferences of this sort. In a Dec. 10 document, it announced that it would prioritize Black, Hispanic, Native American and Asian veterans in vaccine distribution because these communities “have been disproportionately affected by COVID-19.”

This runs into the Fourteenth Amendment to the Constitution, which says citizens of all races are entitled to the equal protection of the laws. The Supreme Court has long interpreted this to mean that the government may ordinarily not dole out valuable benefits, or impose harms, based on a citizen's race.

Courts thus apply “strict scrutiny” to any race-conscious law or policy, requiring proponents to show that it fulfills a “compelling purpose” for the government and is “narrowly tailored” to achieve that purpose, tests that this policy would be unlikely to pass.

There are a few major exceptions but they do not apply here. Compensatory preference is OK when there has been recent, systemic discrimination against a minority group by the same level of government that wants to adopt the preference. (Inequality by itself, even when traceable to society-wide discrimination, isn't good reason.)

Two members of the U.S. Commission on Civil Rights, Gail Heriot and Peter Kirsanow, have already sent the VA a sharp letter outlining the reasons the courts would be quite likely to strike down racial preferences of this sort on equal protection grounds.

It should be noted that some background facts are agreed on. Minorities disproportionately fill some front-line jobs that are at high risk of virus exposure, such as hospital workers and bus drivers. They also suffer disproportionately from some conditions, such as diabetes and cardiovascular disease, that predispose them to worse COVID-19 outcomes.

It's a straightforward application of public health principles, and not greatly controversial, to give earlier access to vaccines to many persons in these groups. Priority for those with pre-existing ailments may reduce overall mortality, and priority for those in front-line jobs pays off in reducing contagion.

Thus, many sensible priority rules do incidentally protect relatively more minority persons — and that's fine, so long as the decision is based on the neutral grounds rather than being a pretext aimed at getting results based on race.

Pretext, however, is more than just a theoretical worry at this point.

While state and local health authorities make most of the ultimate decisions, the Centers for Disease Control's Advisory Committee on Immunization Practices (ACIP) puts out non-binding guidelines that are expected to sway their work. As early as the summer, it became clear that many of those involved in ACIP were pressing for a social-justice-oriented approach that would elevate race and ethnicity as conscious factors in vaccine allocation.

This weekend a furor broke out after the New York Times published a report based on interviews with several persons involved in the CDC process. One University of Pennsylvania medical ethicist "said that it is reasonable to put essential workers ahead of older adults, given their risks, and that they are disproportionately minorities. 'Older populations are whiter. ... Society is structured in a way that enables them to live longer. Instead of giving additional health benefits to those who already had more of them, we can start to level the playing field a bit.'"

Yikes! That's no way to treat someone's grandmother.

Perhaps in part influenced by the outcry, ACIP has now revised its recommendations so as to raise the priority designation for persons over 75 while concentrating worker preference on a more targeted group of front-line workers. I'm no expert on the public health trade-offs involved, so I won't venture any opinion on whether those are the right calls.

Nor do I know whether the talk of putting minorities first in line will backfire by making members of these groups uneasy about being first to try the new. The risks of the Pfizer and Moderna vaccines appear exceedingly low and far lesser than the risks of COVID-19 itself, yet memories are slow to fade of unethical medical experiments of the past.

We should avoid these stumbling blocks by making clear from the start that race should not be a factor in who gets the vaccine and when.

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