Lockdowns and social distancing impinge on activities that are protected by the Constitution. That's been true in many states of church services and in some states of abortion. When the cases have come before they courts, they have often turned to a 1905 Supreme Court case decision, *Jacobson v. Massachusetts*, which upheld a state law requiring smallpox vaccination. Courts are all over the map about what *Jacobson* means in the 21st Century.

Some judges have viewed *Jacobson* as providing a special constitutional standard during epidemics. As I show in a new paper, history doesn't support that view. The Supreme Court wasn't trying to create a special standard for public health emergencies, and later Supreme Court cases have never treated *Jacobson* that way.

Other judges have essentially ignored *Jacobson*, utilizing "business as usual" legal analysis that ignore the crisis conditions under which the government must contend with today. That seems equally wrong to me. The government is required to deal with a fast-changing situation presenting risks of catastrophic loss of life, under conditions of uncertainty. Courts would be wrong to ignore that situation.

In national security cases, the Supreme Court applies the normal constitutional tests but gives extra deference to the government. Many of the reasons are very similar to the coronavirus situation, involving the need to make decisions to avoid serious national harm in a rapidly changing, highly uncertain situation. That doesn't mean that courts automatically uphold government decisions. In the War on Terror cases, for instance, the Court intervened repeatedly to limit government overreach. On the other hand, courts don't try to make their own determination about what measures are needed to protect national security, and they shouldn't make their own public health decisions in a pandemic.

Maintaining the proper balance between oversight and deference is no easy matter. But it's better than the other alternatives: treating pandemic responses as courts would treat routine government actions, or giving the government a blank check to override individual rights.