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February 18, 2017: What the Rule of Law Looks Like

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Title: What the Rule of Law Looks Like

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2/18/2017—I am addressing a question for a program in April on whether the Supreme Court has become too political. It is not clear what the terms mean, exactly. But if we want an example of what we want our courts to do, Thursday's invalidation of a Florida law punishing doctors who ask questions about their patients' gun habits is a good example of a court not doing politics but applying the law. The court en banc (all of the judges) ruled 10-1 against the law on free speech grounds. Any of my students would have ruled the same way—I hope. So, when legislatures go overboard, we want courts to remind us of our core value commitments. (Of course Justice Scalia would say that is why Obergefell is a mistake. Obviously the Supreme Court was not doing that in requiring same sex marriage.) Of course it is easier for a lower court, which must follow precedent, to rule in accordance with settled law. Only the Supreme Court can change that law. But you would like to think that it is the first amendment that compelled Thursday's result and not just its interpretation in caselaw.