If you're a lawyer or a lower court judge, you know you've got a problem when the Supreme Court's opinion begins with a list of parts of the opinion that do or don't have a majority, along with a list of what different permutations of judges said what about the issues. The *Pork Producers* case is a Grade-A prime example of this.

In that case, the Supreme Court upheld California's ban on selling pork from pigs that are treated inhumanely, despite claims that the law interfered with interstate commerce. We know the outcome, but it's not obvious to apply the decision in future cases.

Admittedly, some parts of the ruling are clear. The Court squarely rejected the argument that a special rule prohibits "extraterritorial" state laws — laws that cause companies outside the state to change their behavior. That part of the opinion is clear. It's also clear that the Court still takes a *very* negative view of state laws that discriminate against interstate commerce. What's not clear is just what's left of the law regarding nondiscriminatory laws that burden interstate commerce.

Prior to this case, the established rule was the one announced over fifty years ago in the *Pike* case, There, the Court said nondiscriminatory state laws were subject to a balancing test, in which the judge was supposed to decide if the burden on commerce was clearly excessive compared to the state's regulatory interest. Because the Court was badly fractured in *Pork Producers*, the current status of that rule is unclear.

The problem stems from the fact that the five members of the majority agreed that the Pike test should not be applied but disagreed about why. Four said that the plaintiffs had failed to allege a substantial burden on interstate commerce so *Pike* didn't apply. Three of them said that you can't apply *Pike* in cases where doing so meant balancing a financial impact against a state's interest in a moral issue. Barrett, the fifth vote to uphold the California law, wrote that she was joining this part of the opinion but *not* the substantial burden part. The four dissenters rejected both arguments.

Justice Kavanaugh's dissent says, rather oddly, that the argument with four votes is a controlling precedent. This is odd for two reasons. First, it's not at all clear that this is correct. Five members of the Court — including a key member of the majority — said they rejected the argument. Second, Kavanaugh hated this part of the Gorsuch's opinion, so why is he elevating as a precedent? After all, many lower courts are likely to take his word for it, making it a self-fulfilling prophesy of

something he would prefer to avoid.

Putting aside Kavanaugh's statement, the normal rule is that when part of the majority adopts one rule, and the other part adopts a narrower version, the narrower version becomes the precedent. But that doesn't apply here: what kind of burden a law creates is completely unrelated to whether the law is based on a moral judgment — both issues are equally broad.

Instead of focusing on areas of disagreement, it's better to start with the aspects of the *Pike* discussion where Gorsuch actually did speak for a majority. I see three key places where this is true (drawn from II, IVA and V of the Gorsuch opinion):

1. The majority agree that the "very core" of the judicial doctrine protecting interstate commerce (called the dormant commerce clause doctrine) consists of cases where the state discriminates against out-of-state competitors of local firms. Where this is not true, the majority says, those challenging a law "begin in a tough spot." This suggests that the *Pike* is disfavored except in cases where a state law has a discriminatory impact.
2. The majority also puts up a warning flag about the dormant commerce clause doctrine as whole, using quotes from two earlier opinions: " 'extreme caution' is warranted before a court deploys this implied authority"; and "preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'"
3. Finally, the Court fences off an area where it thinks using *Pike* is especially inappropriate. The majority chastises the industry for arguments that "would have us prevent a State from regulating the sale of an ordinary consumer good within its own borders on nondiscriminatory terms—even though the *Pike* line of cases they invoke has never before yielded such a result."

As to the specifics, the various opinions don't add up a clearcut rule about how to apply the *Pike* test. Nevertheless, the areas of agreement point toward some strong presumptions in applying the dormant commerce clause doctrine, the *Pike* test in particular.

Here's how I would decode the message to the lower courts: "Don't play fast and loose with the dormant commerce clause, and use especially great caution before striking down nondiscriminatory state laws for burdening commerce. And be *doubly* cautious if you're asked to strike down a nondiscriminatory restriction on the in-

state sale of a consumer product.”

This isn’t a red stoplight for the *Pike* balancing test, but it’s at least a flashing yellow warning to respect the power of states to regulate within their borders. As I’ve said before, that’s definitely good news for state environmental and energy regulators.