

SUPREME COURT OF THE UNITED STATES

Nos. 92-1384 AND 92-1839

92-1384 v.
BARCLAYS BANK PLC, PETITIONER
FRANCHISE TAX BOARD OF CALIFORNIA

92-1839 v.
COLGATE-PALMOLIVE COMPANY, PETITIONER
FRANCHISE TAX BOARD OF CALIFORNIA

ON WRITS OF CERTIORARI TO THE COURT OF APPEAL OF
CALIFORNIA, THIRD APPELLATE DISTRICT
[June 20, 1994]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I concur in the judgment of the Court and join all of its opinion except Part IV-B, which disposes of the petitioners' "negative" Foreign Commerce Clause argument by applying the "speak with one voice" test of *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434 (1979).

As I stated last Term in *Itel Containers Int'l Corp. v. Huddleston*, 507 U. S. ___, ___ (1993) (SCALIA, J., concurring in part and concurring in judgment), "I will enforce a self-executing, 'negative' Commerce Clause in two circumstances: (1) against a state law that facially discriminates against [interstate or foreign] commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court." *Id.*, at ___ (footnote omitted). Absent one of these circumstances, I will permit the States to employ whatever means of taxation they choose insofar as the Commerce Clause is concerned. Neither circumstance exists here, and the California tax therefore survives commerce-clause attack.

I am not sure that the Court's opinion today, which requires no more than legislative inaction to establish

that “Congress implicitly has *permitted*” the States to impose a particular restriction on foreign commerce, *ante*, at 28, will prove much different from my approach in its consequences. It is, moreover, an unquestionable improvement over *Itel*: whereas the “speak with one voice” analysis of that opinion gave the power to determine the constitutionality of a state law to the Executive Branch, see 507 U. S., at ___ (SCALIA, J., concurring in part and concurring in judgment), today's opinion restores the power to Congress—albeit in a form that strangely permits it to be exercised by silence.