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Paul S. Weiland

Daniel Imber

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Paul S. Weiland and Daniel Imber***

I. INTRODUCTION

Solid waste management has only recently been placed on the national policy making agenda. While other types of pollution, such as water pollution, air pollution, noise pollution, and hazardous waste have generated national regulations, solid waste has gone largely unregulated for a number of reasons. Foremost among these has been the lack of understanding of damage sustained by poor solid waste management policies. Groundwater pollution and long term damage of large tracts of land have gone unnoticed in our society with its vast resources. In addition, solid waste management is an inherently local issue. Because of the disparity of the types of waste produced in different areas of the nation, varying population concentrations and varying availability of land for landfilling, the placement of solid waste management in the hands of local authorities is logical.

Recently, however, the nation has come to recognize the problems posed by the solid waste dilemma. As landfills have reached maximum capacity and groundwater pollution on a large scale has been detected, efforts to create a comprehensive solid waste management act have been and are being pursued by lawmakers. This paper will explore one aspect of solid waste management at the national level which currently plagues lawmakers—the interstate transport of solid waste.

The first national regulation of solid waste was the Solid Waste Disposal Act of 1965. The Solid Waste Disposal Act did little more than provide for the elimination of the use of open dumps, and set a broad range of regulations on landfills. This act was further amended as the Resource Conservation and Recovery Act of 1976 (RCRA), the Solid Waste Disposal Act Amendments of 1980 and the Hazardous and Solid Waste Amendments of 1984. While these laws regulate certain aspects of solid waste, many are left unregulated. The vision of a comprehensive solid waste management act equivalent to the Clean Air Act or Clean Water Act is far from being realized. As a result, the states have been granted a large degree of breadth in pursuing their own solid waste management policies. However, many attempts by states to bar out-of state waste from landfills and incinerators have been stymied by the courts. It is this issue of interstate waste transport which will be explored herein.

The issue of interstate waste transport is particularly challenging to both state and federal governments for a number of reasons. First and foremost, it revolves around the uneasy state-federal relationship. Since the creation of the United States government by the framers, the relative power allotted to the states and the federal government has been a

*Paul Weiland is a third year Ph.D. student in the School of Public and Environmental Affairs at Indiana University, Bloomington.

**Daniel Imber is a second year law student at the McGeorge School of Law at University of Pacific.

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fundamental issue of debate. Those who contend that a strong central government is imperative assert that federalism may lead to state competition, disjointed policies, and other inefficient results. Proponents of state rights contend that the federal government is overbearing, out of touch with the people and local issues, and in other ways inefficient.

Secondly, states are currently limited in their ability to decline out-of-state waste due to judicial interpretation of the Commerce Clause of the Constitution.[1] As a result states must not only manage their own solid waste, but that of others choosing to dump it upon them. Much of the federal solid waste legislation requires states to implement mandates through state solid waste management plans and state implementation plans. Many scholars and state officials are disgruntled with the current situation in which individual states are given little incentive to act responsibly in handling their own waste because the federal government has ruled that states cannot bar out-of-state waste.

Finally, the federal courts are given the difficult job of interpreting the Constitution, while Congress is given the job of altering or accepting the decision made by the courts. This presents a situation in which the courts are actually formulating the policy, and Congress is, to some extent, delegated the power to review the court's decisions.

Essentially, there are five sets of actors. The first two are local and state governments which do not want to accept out-of-state waste. The third set are solid waste exporters, including local governments and private contractors. Fourth, the courts have entered the arena through a number of cases. Their role is the most complex because the courts have indicated that interstate transportation of solid waste can be regulated by states in some instances, but that it cannot be regulated in others. And finally, Congress is attempting to find an acceptable solution to this issue.

Among the major actors, four possible policy alternatives have been presented. The first is to grant local governments the right to reject out-of-state waste. Secondly, state governments may be granted rights to limit out-of-state waste. These alternatives could only be realized if Congress, through the legislative process, grants states this right, or if the courts deviate from precedent. Third is to grant states conditional rights to reject out-of-state waste. Again, this would require actions on the part of Congress or the courts. Finally, congressional inaction on the issue along with continued court support for present case law would affirm the current situation. This situation is particularly difficult for states and localities which are unsure of their ability to control the amount of solid waste they are importing.

II. CURRENT POLICY

City of Philadelphia v. New Jersey and the Dormant Commerce Clause

The current national policy on the interstate transport of solid waste is based upon a number of Supreme Court decisions, which in turn rest upon constitutional and case law. Article I, Section 8 of the Constitution states, "The Congress shall have the power to regulate Commerce among foreign Nations, and among the several states, and with the Indian Tribes." In *City of Philadelphia v. New Jersey*[2], the Supreme Court overturned a

[1] U.S. CONST. art. 1, § 8, cl. 3.

[2] 437 U.S. 617 (1978).

New Jersey state law which limited the transportation of solid waste into New Jersey. In its opinion delivered by Justice Stewart, the Court stated, "The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation."[3] Thus, Justice Stewart's opinion hinges upon the argument for the dormant Commerce Clause.[4]

In this case, there were two issues of contention—the first being whether the interstate movement of solid waste consists of 'commerce' within the meaning of the Commerce Clause, and the second being whether the New Jersey state law limiting interstate transport of solid waste is an economic protectionist measure or a law directed at legitimate local concerns that has only incidental effects on interstate commerce.

In reaction to the issue of whether the interstate movement of solid waste consists of 'commerce', the Supreme Court held, "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."[5] In a previous ruling on the case, the New Jersey Supreme Court found in conjunction with several prior Supreme Court rulings, "that States can prohibit the importation of some objects because they 'are not legitimate subjects of trade and commerce'."[6] However, in *City of Philadelphia v. New Jersey*, the Supreme Court found that the state court had misinterpreted previous case law.

> In *Bowman* and similar cases, the Court held simply that because the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines. Hence, we reject the state court's suggestion that the banning of "valueless" out-of-state wastes by ch. 363 implicates no constitutional protection.[7]

Therefore, under the court's present interpretation, all objects of interstate trade fall under the Commerce Clause and are thus subject to constitutional scrutiny.

The second issue with which the Court was concerned was whether the New Jersey state law was a protectionist measure, or a law based upon legitimate local concerns that has minimal effects on interstate commerce. The court ruled that, "The New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution."[8] In his dissent, Judge Rehnquist made the following statement:

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[3]*Id.* at 628.

[4]The Commerce Clause has been interpreted as having both a positive and a negative aspect. The positive aspect is that which is actually stated in the Constitution, while the negative aspect is inferred. The positive Commerce Clause is evoked when Congress passes a bill such as the Interstate Commerce Act (1887) which regulates commerce. The negative or 'dormant' Commerce Clause has been utilized by the courts to strike down state legislation in conflict with national commerce policies. The dormant Commerce Clause is evoked when states infringe upon interstate commerce unduly as interpreted by the courts. An important distinction between the two is that the dormant Commerce Clause functions as common law, and is thus subject to congressional review while the positive Commerce Clause is not.

[5]437 U.S. at 622.

[6]Bowman v. Chicago & Northwestern R. Co., 125 U.S. 465, 489 (1887).

[7]437 U.S. at 622.

[8]*Id.* at 629.

> New Jersey should be free under our past precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens. The fact that New Jersey continues to, and indeed must continue to, dispose of its own solid waste does not mean that New Jersey may not prohibit the importation of even more solid waste into the State.[9]

Rehnquist's dissent is based upon the premise that the New Jersey state law is a quarantine law, and as such, should not be considered a forbidden protectionist measure despite that fact that it is directed against interstate commerce. This is based upon *Baldwin v. G.A.F. Seelig, Inc.*[10] and *Bowman v. Chicago & Northwestern R. Co.*[11] In *Bowman* the Supreme Court decided that states can prohibit the importation of items "which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption."[12]

While the Supreme Court has refused to classify solid waste as a legitimate threat to public health which would merit flow control by the states, other courts have recognized the dangers associated with solid waste transportation and disposal. The New Jersey Supreme Court recognized the New Jersey statute limiting the importation of solid waste as being grounded in legitimate health and environmental concerns, rather than any economic benefit the state might gain by controlling the out-of-state waste flow.[13] This argument is bolstered by numerous studies indicating the severity of health and environmental problems associated with solid waste disposal.[14] One such study found that of the 850 sites listed on the Superfund National Priorities List in May of 1986, twenty-two percent were municipal solid waste landfills.[15]

A second argument which may be made in light of the Supreme Court's ruling is that the State of New Jersey has not saddled those outside the state with the entire burden of slowing the flow of solid waste into the State's landfills. The State has taken numerous steps to control the domestic flow of solid waste, in addition to efforts to control the importation of solid waste.

City of Philadelphia v. New Jersey has set a precedent which has been upheld in a number of recent decisions—*Oregon Waste Systems v. Department of Environmental Quality of the State of Oregon*[16], *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*[17] and *Chemical Waste Management, Inc. v. Hunt.*[18] This would indicate that it

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[9]*Id.* at 632.

[10]294 U.S. 511 (1935).

[11]125 U.S. 465 (1887).

[12]Bowman v. Chicago & Northwestern R. Co., 125 U.S. at 489.

[13]Hackensack Meadowlands Dev. Comm'n. v. Municipal Sanitary Landfill Auth., 348 A.2d 505, 516 (N.J. 1975), *vacated*, Philadelphia v. New Jersey, 437 U.S. 617 (1978).

[14]For a review of the problems associated with solid waste management *see* Kristen Engel, *Environmental Standards as Regulatory Common Law: Toward Consistency in Solid Waste Regulation*, 21 N.M. L. REV. 13 (1990).

[15]53 Federal Register 33,314 (1988).

[16]62 U.S.L.W. 4209 (1994).

[17]60 U.S.L.W. 4438 (1992).

[18]60 U.S.L.W. 4433 (1992).

is unlikely that the Court will overturn current case law, and if the policy is to change, the impetus must come from Congress which has been delegated the power to regulate interstate commerce by the Constitution and the courts.

The pivotal holding by the Supreme Court was that the New Jersey statute discriminated against out-of-state waste disposal while permitting unrestricted disposal of in-state waste.[19] This does not constitute a declaration by the Court that states cannot regulate out-of-state waste. The courts instead have decided that a balance must be struck between regulation and commerce. This balance was articulated in *Pike v. Bruce Church Inc.*:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . If a legitimate local purpose is found than the question becomes one of degree.[20]

If this balancing test is not violated and local or state government regulates with evenhandedness and if effects in interstate commerce are only incidental, the regulation may be upheld.[21]

The Market Participant Doctrine and the Natural Resource Exception

In its decision *City of Philadelphia v. New Jersey*, the Court left open the issue of whether state owned facilities are allowed to prohibit out-of-state waste. Since that time, five decisions have been made in lower courts which uphold state rights to discriminate against out-of-state waste when the state is a participant in the market.[22] The market participant doctrine was first explicitly adopted by the Supreme Court in the case of *Hughes v. Alexandria Scrap Corp.*[23] In this case, the Court ruled that because Maryland had entered into the market itself to limit out-of-state participation, the Commerce Clause was not applicable. This case has been upheld in a number of additional rulings, however at times the market participant doctrine has seemed particularly vulnerable. The clearest example came with the decision in *Garcia v. San Antonio Metropolitan Transit Authority* which eliminates affirmative limits on the Commerce Clause power of the Congress.[24]

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[19]Bradford Mank, *Out-of-State Trash: Solid Waste and the Dormant Commerce Clause,* 38 WASH. U. J. URB. AND CONTEMP. L. 25, 29 (1990).

[20]397 U.S. 137 (1970).

[21]*See,* Evergreen Waste Systems,Inc. v. Metropolitan Service Dist., 643 F.Supp. 127 (D. Or. 1986). "Under balancing test, local ordinance does not violate commerce clause if it regulates evenhandedly, is based on legitimate local public purpose, has only incidental effect on interstate commerce, and does not burden commerce excessively excessively in relation to putative local benefits." In the case, judgement was made for the defendant, Metropolitan Service District, which prohibits deposit of waste from outside the District in a District-operated landfill.

[22]*See,* Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989); Lefrancois v. State of Rhode Island, 669 F.Supp. 1204 (D. R.I. 1987); Evergreen Waste Systems, Inc. v. Metropolitan Service Dist., 643 F.Supp. 127 (D. Or. 1986); Shayne Brothers, Inc. v. District of Columbia, 592 F.Supp. 1128 (D. D.C. 1984) County Comm'rs. v. Stevens, 473 A.2d 12 (Md. 1984).

[23]426 U.S. 794 (1976).

[24]469 U.S. 528 (1985).

This differentiation between the state as market participant and market regulator has become a crucial factor in determining whether or not a state is subject to Commerce Clause restrictions. When states or their subdivisions are acting as market participants, they are free from Commerce Clause restrictions, and they may favor in-state customers.[25]

An exception to the market participant doctrine exists when natural resources are the subject of interstate commerce. Prior to the 20th century, the courts considered natural resources the property of the states in which they existed. However, beginning at the turn of the century the courts made a number of rulings prohibiting states from hoarding natural resources.[26] These rulings, which collectively symbolize the nullification of the market participant doctrine in cases involving natural resources, were invoked under the dormant Commerce Clause. In certain instances, natural resources must be invested in by the state to ensure their preservation. In such a case the market participant doctrine may hold. "In *Baldwin v. Fish & Game Commission*[27], for example, the Court upheld a state law that discriminated against nonresidents in granting permits to hunt elk after recognizing that 'wild' elk still roam Montana largely because the state had invested in their preservation by employing rangers and regulating hunting."[28] As a result, two factors influence the natural resource exception to the market participant doctrine. First, did the state invest significantly in the preservation and/or maintenance of the natural resource in question? And secondly, what effects does the state regulation in question have upon interstate commerce?

While the natural resource exception clearly has no bearing upon solid waste which is targeted for incineration, it potentially has serious implications for solid waste which is destined for landfills. In his article, Bradford Mank states a number of facets of the issue quite clearly.

> The courts that have applied the market participant doctrine to landfills have argued that landfills are services rather than natural resources. On the other hand, Kovacs and Anderson contend that landfills are clearly within the natural resources exception. This article contends that landfills are a hybrid or mixture of natural resources, primarily land, and services.[29]

One final alternative interpretation would be that landfills are indeed natural resources, yet states invest significantly in them. Utilizing this interpretation, landfills would fall under the market participant doctrine, despite their classification as natural resources. Present

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[25]U.S. CONST. art. 1, § 8, cl. 3; Evergreen Waste Systems, 643 F.Supp. at 127 (D. Or. 1986).

[26]For example, see Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911); Pennsylvania v. West Virginia 262 U.S. 553 (1923); Foster Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Toomer v. Witsell, 334 U.S. 385 (1948). For a more recent example of the natural resource exception to the market participant doctrine *see* Hughes v. Oklahoma, 441 U.S. 322 (1979).

[27]436 U.S. 371 (1978).

[28]David Pomper, *Recylcing Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustial "Natural" Resources, and the Solid Waste Crisis,* 137 U. PA. L. REV. 1309, 1330 (1989).

[29]Bradford Mank, *Out-of-State Trash: Solid Waste and the Dormant Commerce Clause* 38 WASH. U. of URB. AND CONTEMP. L. 25, 43 (1990). *See also* Kovacs and Anderson, *States as Market Participants in Solid Waste Disposal Services - Fair Competition of the Destruction of the Private Sector,* 18 ENVIRONMENTAL LAW 779 (1988).

case law has established that landfills do fall squarely under the market participant doctrine, and the courts have viewed landfills as services not natural resources.[30]

Therefore, current policy as indicated by the courts permits limitations on out-of-state waste by potential waste importers when (1) the restriction of out-of-state waste serves a legitimate local interest and has only incidental effects upon interstate commerce, or (2) the state is acting in the capacity of market participant as opposed to market regulator. If neither of these conditions is met, states are not permitted to prohibit or discriminate against out-of-state waste. Furthermore, while these two rules seem to hold presently, additional rulings may alter the current situation.

Because rulings upon the dormant Commerce Clause and interstate solid waste transportation have not been consistent, state policy makers are unable to develop autonomous state implementation plans without first considering the potential impact of imported waste. As long as policy is unclear, this problem will continue, resulting in disproportionate allocation of environmental problems, and an inability upon the part of state and local governments to control the potential public health threat posed by the importation of solid waste.

III. CONCLUDING REMARKS

The current national policy concerning solid waste transportation across state lines is disjointed, and in need of repair. Involvement by the federal government in the issue via the courts has resulted in confusing, and sometimes contradictory decisions and policies. Under the dormant Commerce Clause interstate transportation of solid waste cannot be regulated by states or their subdivisions. However, there are a number of exceptions to this rule. Because values play such a large role in this issue, no standard decision-making procedure has been developed. Therefore, policies are unclear and as a result no benchmark exists by which states and localities may gauge their actions.

Policy in this area is not simply the result of Supreme Court decisions, but of a number of interdependent historical forces. If the current policy is to be improved, it is necessary to understand the factors which have affected it—both from within the judiciary and outside the judiciary.

Perhaps most fundamental among the factors which have led to the current policy is congressional inaction. In his book *Constitutional Dialogues,* Louis Fisher presents a thorough analysis of the role of the courts in constitutional questions.

> The Supreme Court is not the sole of even dominant agency in deciding constitutional questions. . . For members of Congress to shy away from these issues, claiming that the courts must make the ultimate determination, is tempting but irresponsible. The Court needs the conscientious guidance of the legislative and executive branches.[31]

Up to this point Congress has continued to ignore the issue of interstate waste transport, and as a result the courts have taken the initiative to legislate policy through their decisions.

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[30]*See supra* note 17.

[31]LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 5 (1988).

Such action on the part of the courts was not envisioned by the Framers of the Constitution. "The Supreme Court has assumed the function of a continuing constitutional convention and has become the nation's supreme legislative body—a fundamental shift from that balance of power and responsibility which Thomas Jefferson hoped was firmly embodied in the Constitution."[32]

In addition, a number of structural factors greatly influence policy as it has been made by the courts. These are well-documented within the literature on judicial policy making. First among these is the fact that the courts must act when—and only when—a litigant presents a case.[33] Judges are unable to initiate action. As a result, involvement by the courts in the process has been described as sporadic, fragmented and episodic.[34] Secondly, the courts are focused, limited to the issues and facts presented in a case and unable to consider multiple alternative outcomes available to other decision makers.[35] A third structural factor is the incremental nature of the adjudicatory process. "The lawsuit is the supreme example of incremental decisionmaking."[36] In his book, Martin Shapiro points out that, "while most statute making is likely to be incremental, it can be fairly said the statute maker can and sometimes does take longer steps than the courts can and do take."[37]

A final factor which has influenced policy in this area is the continued marginalization of environmental and health concerns in the name of free trade and economics. This point has been succinctly made by Charles DuMars.

> Encouraging the generation of more interstate business and helping the nation move forward as one national economic unit is a positive goal that was anticipated by the framers of the Constitution. In contrast, encouraging the generation of garbage is not something the national body politic must do to survive.[38]

In fact, it is clear that in order to protect human health and the environment and ensure the long term viability of the nation, it will be necessary to reduce the generation of garbage.

To ameliorate the current situation, action must be taken to create a policy upon which all interested parties may rely—a consistent policy. When doing so, two key issues should be considered. First, when developing such a policy it is vital that decision makers consider the welfare of localities, states and the nation as a whole simultaneously. Solid waste transport should be integrated within the overall policy area of solid waste management, complementing rather than contradicting efforts to reduce solid waste and safely dispose of waste which is produced. All too often contradictory policies send mixed signals to states, localities and citizens. By encouraging states to take responsibility for their own

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[32]Lynton K. Caldwell, *The Administrative Republic: The Contrasting Legacies of Hamilton and Jefferson*, 13 PUB. ADMINISTRATION Q. 470, 487 (1990).

[33]R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 14 (1983).

[34]*See* JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 6 (1989) and MARTIN SHAPIRO, THE SUPREME COURT AND ADMINISTATIVE AGENCIES 61 (1968).

[35]DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY 38-45 (1977).

[36]*Id.* at 35.

[37]MARTIN SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 30 (1968).

[38]Charles DuMars, *State Market Power and Environmental Protection: A State's Right to Exclude Garbage in Interstate Commerce*, 21 N.M. L. REV. 37 (1990).

waste on one hand and allowing the free movement of waste between states on the other, current policy leads to suboptimal outcomes.

The recently decided *C & A Carbone v. Town of Clarkstown, New York* exemplifies the difficulties caused by judicial policy making.[39] In order to solicit an outside contractor to build a transfer station to separate recyclable from nonrecyclable items in the town and to finance the cost of the transfer station, town officials had to guarantee a minimum waste flow to the facility. "In order to meet the waste flow control guarantee, the town adopted a flow control ordinance, requiring all nonhazardous solid waste within the town to be deposited at the transfer station."[40] The flow control ordinance was found to violate the Commerce Clause and therefore was struck down by the Supreme Court. This ruling limits the ability of the town to take proper measures to meet federal solid waste management laws. It also inhibits the ability of the town to protect its long term interests in human health and the environment.

The second and perhaps most important issue becomes one of which federal institution, the Congress or the courts, should establish such a policy. Congressional inaction created an opportunity for the courts to establish present policy. Subsequently, the courts have made inconsistent decisions, complicating the issue. "Clearly litigation is not the best way to formulate environmental policy or to determine our nation's environmental priorities."[41] Therefore, Congress has the responsibility to correct the defective policy which is now in place.

Furthermore, while the courts have invoked the dormant Commerce Clause to justify their involvement in the issue of interstate solid waste transportation, the Commerce Clause was formulated by the founders in order that *Congress* should maintain ultimate control over issues involving interstate commerce. This delegation of power to Congress is one aspect of an effort by the Founding Fathers to separate powers among the three branches of government. Although the branches of government certainly overlap, in this instance Congress has a responsibility as stated in the Constitution to decide this issue and not to leave it to the courts. Use of court proceedings to settle conflicts concerning the transportation and disposal of solid waste is "almost a certain guarantee that the political process has failed."[42] By passing legislation on this issue, Congress may reassert a commitment of the federal government to federalism—a commitment which has been seriously questioned since the Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority*.[43]

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[39]62 U.S.L.W. 4315 (1994)

[40]*Id.*

[41]ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 170 (1993).

[42]This phrase is used by Wright in regard to hazardous waste transportation, storage and disposal in DEIL WRIGHT, UNDERSTANDING INTERGOVERNMENTAL RELATIONS 387 (3rd ed. 1988). However, it applies equally to the problems associated with solid waste management transportation and disposal.

[43]*See supra* note 24.