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THE INDEFENSIBLE DEFENSE OF IMPOSSIBILITY: EXCUSING LOCALITIES FROM THE PERFORMANCE OF STATE-MANDATED DUTIES

STEPHAN LANDSMAN*

I. THE DOCTRINE OF IMPOSSIBILITY

Between 1968 and 1970, Franklin County, Ohio, was in difficult financial straits. Budgetary requests for fiscal year 1970 totalled $17,161,000 while available resources totalled only $13,800,000. One of the most expensive items in the budget during this period was the county's share of public assistance costs. This share had been certified by the Ohio Department of Public Welfare as $2,013,000 for fiscal year 1969, and was expected to be $2,416,000 for fiscal year 1970. In addition to the certified amount, the county was expected to pay $351,000 into the Public Assistance Fund to liquidate a deficit that had accumulated in 1968. Motivated by the monetary troubles of the county, the Franklin County Commissioners chose to appropriate neither the $2,013,000 required for welfare expenditures in 1969 nor the $351,000 owing from 1968. It would appear that payment into the Public Assistance Fund was the only state-mandated fiscal obligation repudiated by Franklin County. The county commissioners' refusal to appropriate the specified sums clearly violated the Ohio Public Welfare law.


1 The doctrine of impossibility discussed in this article was delineated by the Ohio Supreme Court in State ex rel. Brown v. Board of County Comm'rs, 21 Ohio St. 2d 62, 255 N.E.2d 244 (1970). The doctrine appears to have had its roots in contract principles. See note 87 infra and accompanying text. For the precise meaning of the doctrine, see notes 5 and 19 infra and accompanying text.


3 Id. at §§ 4 & 12. The amount certified to the Board of County Commissioners for 1969 was $2,013,036; the 1968 deficit was $351,049.81. For purposes of this discussion, all such figures in the text are given to the nearest thousand.

4 21 Ohio St. 2d at 63, 255 N.E.2d at 245.

5 There is no indication in the opinion, pleadings, briefs or other papers in Brown that any other state-mandated obligation was not met. From all the facts it would appear that funds were available to pay the mandated sum. See notes 12-13 infra. Under these circumstances, refusal to pay should be classified as a repudiation of the debt. See Dession, Municipal Debt Adjustment and the Supreme Court, 46 YALE L. J. 199, 201 (1936) [hereinafter cited as Municipal Debt Adjustment].


Prior to December sixteenth, annually, the department of public welfare shall certify to the board of county commissioners of each county the amount estimated by the department to be needed in the following calendar year to meet the county share, as defined in section 5101.16 of the Revised Code, of expenditures for aid, health care, and administration under Chapters 5105., 5106., 5107., 5113., and 5151. of the Revised Code. At the beginning of the fiscal year the board of county commissioners shall appropriate
Pursuant to the explicit requirement of the Ohio Revised Code, the Attorney General brought an action in mandamus before the Supreme Court of Ohio, seeking to compel the county commissioners to appropriate the sums that had not been paid into the Public Assistance Fund. After commencement of the action, the commissioners appropriated the $2,013,000 county share of public assistance costs for 1969; however, they refused to appropriate the $351,000 needed to discharge the 1968 deficit. The commissioners asserted that no funds were available for such an appropriation and that if the county were forced to expend the sum in issue, a wide range of county government operations would have to be curtailed.

The parties entered into an Agreed Statement of Facts which, according to the court, demonstrated that if the writ of mandamus were granted the offices of the commissioners, auditor, treasurer, recorder, sheriff, coroner, and engineer would be curtailed to such an extent that it would be impossible for them to perform their statutory duties.

Justice Corrigan, speaking for a unanimous court, denied the writ of mandamus. He found upon the stipulated facts that there was a conflict between state-mandated obligations which on the one hand compelled payment into the Public Assistance Fund and on the other hand allegedly required the county to make other use of the same resources. The court

the amount certified by the department, reduced or increased by the amount of the balance or deficit in the public assistance fund at the end of the fiscal year. The attorney general shall bring mandamus proceedings against any board which fails to make such an appropriation.

The current version of section 5101.161 does not differ materially from the text quoted here and considered in the Brown case.

7 See note 6 supra.
8 State ex rel. Brown v. Board of County Comm’rs, 21 Ohio St. 2d 62, 255 N.E.2d 244 (1970).
9 Id. at 63-64, 255 N.E.2d at 245.
10 Id. at 63, 255 N.E.2d at 245.
11 Id. at 64, 255 N.E.2d at 245.
12 Id. This characterization of the Agreed Statement of Facts is open to challenge. Paragraph 15 of the Statement indicates that the 1970 budgetary requests “mandated under Ohio law” in Franklin County totalled $9,259,000; paragraph 11 specifies a total county income of $13,800,000. This information indicates that an appropriation of $351,000 could have been made without disrupting any budgetary request “mandated under Ohio law.” The court’s characterization of the county’s financial status was based only on the last two paragraphs of the Statement:

(17) That were the Franklin County Commissioners called to testify in this cause, they would say that if they are mandamused to appropriate $351,049.81 to the Public Assistance Fund covering the deficit at the end of the fiscal year 1968, they would be compelled to reduce the budgets of the Franklin County Commissioners, Auditor, Treasurer, Recorder, Sheriff, Coroner, and Engineer.

(18) That were the Franklin County Commissioners, Auditor, Treasurer, Recorder, Sheriff, Coroner, and Engineer called to testify in this cause, they would say that if their budgets for the year 1969 were further reduced by the County Commissioners, they would not be able to perform the statutory and mandatory duties of their respective offices.

13 21 Ohio St. 2d at 64, 255 N.E.2d at 245. The court’s conclusion that Franklin county was compelled by state law to use all available funds to finance state-mandated duties other than public assistance is not warranted by the Statement of Facts in the case. As indicated in note 12, supra, approximately $4,550,000 was spent by Franklin County in 1970 for non-mandated budgetary items. The court did not indicate why these funds could not be used to pay the Public Assistance Fund mandate. It should also be noted that the court did not consider whether Franklin County was utilizing its taxing and other revenue generating capacity to the fullest extent possible in an effort to generate needed income. Prior Ohio Supreme Court opinions have
concluded that this conflict was not appropriate for judicial resolution. The court apparently classified the problem as a political question, one that could only be resolved by the Ohio General Assembly.\footnote{\textit{14}}

In reaching its conclusion, the court indicated some reliance on \textit{State ex rel. Motter v. Atkinson}.\footnote{\textit{15}} Examination of this case, however, suggests that it does not support the court’s argument. In \textit{Atkinson} the probate court judge of Vinton County brought an action against the county commissioners, based on their failure to appropriate funds needed to finance the state-mandated operations of the probate court. The commissioners claimed that the county had insufficient funds to meet the needs of the probate court and to keep other county offices open.\footnote{\textit{16}} The supreme court dismissed the commissioners’ argument and held that the state spending requirement had to be honored. The court rejected the argument that competing fiscal needs are an adequate basis for a county’s refusal to carry out state law, stating that

\[\text{[t]he hardship, if any, visited upon the operation of the other county offices through lack of funds resulting from the appropriation of the amounts requested by the probate judge for the operation of his offices, is a matter over which this court has no control, but is wholly within the province of the General Assembly.}\footnote{\textit{17}}

The \textit{Brown} decision stood the \textit{Atkinson} holding on its head. Rather than compel expenditure and require the General Assembly to resolve the conflict as had been done in \textit{Atkinson}, the \textit{Brown} court refused to compel the expenditure, and sent the Attorney General and those deprived of welfare assistance to the legislature in search of an unspecified remedy.\footnote{\textit{18}} The court’s decision in \textit{Brown} undermined the General Assembly’s decision to make welfare expenditures obligatory. This result must be contrasted with that reached in \textit{Atkinson}, in which the mandate of the General Assembly was enforced by the court and made subject to change only at the behest of the General Assembly.

The \textit{Brown} court did not rest its decision entirely upon the notion of an inviolable “political question.” In addition, it declared mandamus to be a high prerogative writ to be granted only in the court’s discretion, and then refused to exercise that discretion. The basis for this denial was the conclusion stated that municipalities are under a duty to demonstrate that they have exhausted all revenue-generating resources before the court will even consider relief from state mandated duties. \footnote{\textit{See, e.g., State ex rel. Southard v. City of Van Wert, 126 Ohio St. 78, 184 N.E. 12 (1932). For a discussion of this case, see notes 91-97 infra, and accompanying text.}}

\footnote{\textit{14} 21 Ohio St. 2d at 64, 255 N.E.2d at 245.}

\footnote{\textit{15} “Such a conflict in the statutory law does not readily lend itself to resolution by the courts but, as we indicated in \textit{State ex rel. Motter v. Atkinson}, 146 Ohio St. 11, 16, 63 N.E.2d 440, 442-43 (1945) is a question ‘wholly within the province of the General Assembly.’” 21 Ohio St. 2d at 64.}

\footnote{\textit{16} 146 Ohio St. at 14, 63 N.E.2d at 442.}

\footnote{\textit{17} Id. at 15-16, 63 N.E.2d at 442.}

\footnote{\textit{18} What more the General Assembly could do in the \textit{Brown} case is unclear. It had already absolutely mandated county appropriations to meet welfare costs. The only alternative open to the General Assembly would seem to have been the scrapping of the entire state welfare structure. Such a step would have been extremely time consuming. One cannot help but be skeptical of the capability of the General Assembly to produce a short term solution to the pressing problems faced by beneficiaries of the Public Assistance Fund in Franklin County.}
that the issuance of the writ "would require the respondent to perform acts which are impossible to perform because of a lack of funds." The court cited one case in support of its acceptance of this "impossibility" defense, *State ex rel. Burgess v. Crabbe.* Crabbe involved the attempt of the liquidator of a bankrupt British insurance company to recover the proceeds of a fund the company had deposited with the State of Ohio in order to do business in the state. The liquidator sought to compel the Attorney General and the Superintendent of Insurance to bring an action to determine the rights of policy holders with potential claims against the fund. The court refused the writ, reasoning that all such claims had not as yet matured and that it was therefore impossible to finally determine the rights of all interested parties.

The relevance of the Crabbe decision to Franklin County's dilemma seems extremely slight. There was no hint in Crabbe that the doctrine of impossibility could be applied to excuse a government entity from carrying out a mandatory duty. In fact, Crabbe required the insurance company to carry out its state-mandated obligation to maintain an insurance fund on deposit in Ohio. Crabbe barred the dissolution of the fund, thereby effectuating state law. The *Brown* opinion sought to justify an opposite result: the expenditure of funds notwithstanding the requirements of state law. Crabbe prevented repudiation, of state law, *Brown* endorsed it. For these reasons it would appear that the court's use of the Crabbe case is open to the most serious challenge.

The precedent established in *Brown* was shortly thereafter relied upon by the Ohio Supreme Court in *State ex rel. Johns v. Board of County Commissioners* to excuse the commissioners of Richland County from the state-mandated duty to construct or finance a juvenile detention facility. The court held in a per curiam opinion that the county commissioners' claim that the county was "operating at its maximum debt limit and that they [were] without funds sufficient to provide a juvenile detention home or provide for its maintenance and operation" established a good defense to a motion for judgment on the pleadings. The supreme court reiterated the principle that "impossibility of performance is a viable defense," and remanded the case for the taking of evidence on the issue of impossibility.

In 1976, Summit County, Ohio, found itself in an economic position comparable to that of Franklin County between 1968 and 1970. Following

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19 State *ex rel. Brown v. Board of County Comm'rs,* 21 Ohio St. 2d at 65, 255 N.E. 2d at 246. It should be noted that the "impossibility" involved in this case was not absolute. Franklin County did not face insolvency. Rather, it faced some difficult fiscal choices in the allocation of its resources. It chose to refuse payment of one particular obligation in order to free funds for other purposes. *See note 5 supra.*

20 Id. at 517, 151 N.E. 759 (1926).

21 Id. at 518-19, 151 N.E. at 759.

22 Id. at 521-22, 151 N.E. at 760.

23 29 Ohio St. 2d 6, 278 N.E. 2d 19 (1972).

24 Id. at 7, 278 N.E. 2d at 20.

25 Id. at 8, 278 N.E. 2d at 21.

the example of the Franklin County Commissioners in Brown, the Summit County Commissioners refused to appropriate their full share of general relief costs. Although the Ohio Department of Public Welfare had certified $2,780,000 as the county's share, the commissioners appropriated only $654,000. The result of this action was the suspension of public assistance payments to all Summit County residents who had been recipients of general relief.Apparently relying upon the holding in Brown, the Ohio Attorney General refused to initiate a mandamus action against the county commissioners. Faced with absolute deprivation of public assistance, general relief recipients in Summit County commenced an action in mandamus to force the commissioners to make the necessary appropriation. The Court of Common Pleas dismissed the recipients' claim in Cain v. Birkel, holding that they had no standing to challenge the commissioners' actions, and that the county was entitled to assert the defense of impossibility. On the issue of impossibility, the court of appeals ruled that adequate proof had not been presented.

Hence it would appear that in Ohio today fiscally hard-pressed localities

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27 While Ohio statutes refer to this program as "poor relief", both the Robinson and Cain opinions use the more commonly employed term, "general relief." The terms are interchangeable.

Ohio Rev. Code Ann. § 5113.01 (Page 1970) provides:
"Poor relief" means food, clothing, public or private shelter, the services of a physician or surgeon, dental care, hospitalization, and other commodities and services necessary for the maintenance of health and decency.
Poor relief may be given in cash, by order, or both, and shall be inalienable whether by way of assignment, charge, or otherwise, and exempt from attachment, garnishment, or other like process. Local relief authorities shall not disburse funds through any private organization. Poor relief may be given to persons living in their own homes or other suitable quarters, but not to persons living in a county home, city infirmary, jail, or tuberculosis sanitorium or to children who are not living with their parents, guardians, or other persons standing in place of parents.

Ohio Rev. Code Ann. § 5113.03 (Page 1970) provides:
Poor relief shall be given on a budgetary basis and shall be sufficient to maintain health and decency, taking into account the requirements and the income and resources of the recipient. The receipt of other forms of public assistance shall not prevent the receipt of poor relief if additional need exists.


31 Id. at 2-3.


33 Id.


35 Id. at 7.

36 The "localities" upon which this Article focuses are the counties, municipalities, and other political subdivisions established by the State to carry out governmental functions at the local level.
may be able to avoid state-mandated obligations by relying on a claim of impossibility. While the law in this area is not settled, it would seem that the mandatory programs most vulnerable to attack are those providing benefits to the impoverished or the young. The remainder of this Article will analyze the doctrine of impossibility and review the scope of judicial authority to compel local participation in mandated programs.

II. THE CONCEPTUAL INADEQUACY OF THE DOCTRINE OF IMPOSSIBILITY

Before turning to an examination of the impossibility doctrine and the Brown case, it will be helpful to canvass some of the principles governing relations between state and local governments in Ohio and elsewhere. At common law, states have been viewed as having plenary power over local government entities. Under this view the state may act at any time to create or destroy any locality. The notion that there is an inherent right to local self-government has been rejected throughout the United States.

Local government entities have fared no better under the United States Constitution than at common law. The United States Supreme Court has held that the due process, equal protection, and contract clauses of the Constitution do not limit state dominion over localities. The taxing power of a subdivision is "subordinate to the unrestrained power of the state." The Federal Constitution inhibits state authority over localities only when that authority is exercised to achieve an otherwise unconstitutional purpose.

Absent alteration of common law by state statutes or state constitution, therefore, localities are mere agents of the state. They are convenient

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37 These programs would appear most vulnerable because the specific holding of the Ohio Supreme Court in Brown and Johns have authorized repudiation of obligations involving assistance to welfare recipients and juveniles.


41 See, e.g., City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923); State ex rel. Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913).

42 See, e.g., City of Trenton v. New Jersey, 262 U.S. 182 (1923).


45 Faitoute Co. v. City of Asbury Park, 316 U.S. 502, 509 (1942).

46 See, e.g., Commerion v. Lightfoot, 364 U.S. 339 (1960) (racially discriminatory effect achieved by the realignment of municipal boundaries held unlawful).

administrative units created to execute state policy in particular geographic areas. Their sole function is to implement state law.

The majority of states, including Ohio, have altered the common law rule concerning local authority by adopting various kinds of "home rule" provisions. Such provisions virtually never result in local autonomy, but rather grant localities the power to exercise certain governmental prerogatives without the prior authorization of the state legislature, or limit state regulation of matters of purely local concern. The result usually has been a sharing of authority between the state and the local governments. Generally, home rule has not barred state activities which require local implementation or administration.

When a conflict arises between the activities of a home rule locality and state legislation, the latter generally has prevailed, particularly when the matter is one of statewide concern. The state does not surrender its sovereignty when there is a home rule provision; it remains the sovereign and its authority is paramount. The holding in Brown is not consistent with these


49 For a discussion of the meaning of the term home rule, see Municipal Power, supra note 38, at 644-66. The constitutions of at least 28 states, including Ohio, contain home rule provisions. Id. at 645.

50 See Municipal Power, supra note 38 at 645.

51 Id. at 648. See, e.g., Ohio Const. art. XVIII, § 3, which provides: "Municipalities have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws."


53 As set forth in Ohio Const. art. XVIII, § 3, municipalities may "adopt and enforce such local police, sanitary and other similar regulations as are not in conflict with general laws." Defining the point at which a "conflict" arises between state law and local activity is not an easy task in Ohio. For an excellent discussion of this problem, see Vaubel, Municipal Corporations and the Police Power in Ohio, 29 OHIO ST. L.J. 29 (1968) [hereinafter cited as Vaubel]. At a minimum, a conflict exists where there is a "head-on collision." See, e.g., Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923) ("Conflict" not found unless a municipal ordinance declares something to be right that the state law declares to be wrong, or vice versa). Even when there is no technical "conflict," a divergence requiring adjustment may be found as a result of state preemption. See, e.g., Stary v. Brooklyn, 162 Ohio St. 120, 121 N.E.2d 11 (1954) (Local ordinance upheld upon a finding that specific state statutes did not preempt the entire field of trailer park regulation); Ferrie v. Sweeny, 34 Ohio Op. 272, 72 N.E.2d 128 (C.P. 1946) (Local ordinance providing money for day-care centers preempted by state intent to occupy the entire field of child welfare). But see Vaubel, supra, at 46-50.

54 In general, local activity will only prevail over state law if the activity has "no effect on citizens of the state living outside the municipality." Note, Conflicts Between State Statutes and Municipal Ordinances, 72 HARV. L. REV. 737, 741 (1959). In Ohio, issues deemed to be of statewide concern and therefore beyond local interference include: poor relief, State ex rel. Ranz v. Youngstown, 140 Ohio St. 477, 45 N.E.2d 767 (1942); public education, Niehaus v. State ex rel. Board of Educ., 111 Ohio St. 47, 144 N.E. 433 (1924); public health and pollution control, City of Bucyrus v. State Department of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); and child care, Ferrie v. Sweeny, 34 Ohio Op. 272, 72 N.E.2d 128 (C.P. 1946). For a somewhat different interpretation of these cases, see Vaubel supra note 53.

55 The Ohio Supreme Court has been quite emphatic on this point. See, e.g., Niehaus v. State ex rel. Board of Educ., 111 Ohio St. 47, 144 N.E. 433 (1924); State ex rel. Taylor v. French, 96 Ohio St. 172, 184, 117 N.E. 173, 176 (1917). See also F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS, 349-50 (1970) [hereinafter cited as MICHELMAN & SANDALOW].
concepts of home rule and state primacy. The doctrine of impossibility accepted in Brown authorizes unrestricted repudiation of state mandates as long as there has been some showing of fiscal hardship. Brown permits localities to choose the programs they will continue and the ones they will terminate. Programs of statewide applicability thus may be nullified.

In addition to undermining state sovereignty, an interpretation of the law that exalts local concerns over statewide interests can seriously damage the effectiveness of government programs. For example, experience has shown that the quality of public assistance programs suffers when they are provided in a piecemeal or uncoordinated fashion. As early as the nineteenth century, John Stuart Mill noted the danger inherent in allowing localities to deal separately and independently with the impoverished. Mill foresaw that as a result of economic difficulties or simple mismanagement, some localities would become "nest[s] of pauperism, necessarily overflowing into other localities and impairing the moral and physical condition of the whole laboring community."56 The importance of central coordination of public relief was widely ignored in America until the 1930's when the economic depression caused the collapse of local public assistance schemes. In the ensuing effort to place relief on a firmer footing, the states and the federal government were compelled to assume the burden of managing the public assistance structure.57 The Brown decision fails to respect these historical and administrative considerations. It allows localities to evade responsibilities imposed upon them as part of the state's centralized relief plan, and thereby undermines the social welfare structure.

In State ex rel. Ranz v. City of Youngstown,58 decided before the Brown case, the Ohio Supreme Court had recognized both the need for state control over the relief-giving apparatus and the fact that the state had taken such control through its welfare laws. In the second paragraph of the syllabus of Ranz, the court stated, "[r]elief of the poor is a state function."59 The Ranz court recognized the authority of the state to establish the administrative and financial arrangements necessary to insure continuing relief for the poor. Deciding that a taxpayer could not successfully challenge a state-mandated financing scheme for public assistance on the grounds that city poor relief was financed solely by county funds,60 the court held that a county government is a creature of the state, "a wholly subordinate political division or instrumentality for serving the state."61

The decision in Brown cannot be harmonized easily with that in Ranz. Brown authorizes county repudiation of state welfare spending mandates;
this is at odds with the classification in Ranz of the county as an entity created specifically to effectuate state policies, including provisions for the poor.\textsuperscript{62} Such repudiation is antithetical to the Ranz holding that the provision of relief is a state function which is to be carried out by counties as the state directs. As a result, Brown undermines the ability of the state to develop and to maintain an orderly system for public assistance. It grants counties a measure of sovereignty over public welfare programs never authorized in state law, thereby crippling the statewide welfare structure which was fashioned to meet modern public assistance needs.\textsuperscript{63}

In addition to diminishing the effectiveness of welfare programs throughout Ohio, the Brown decision encourages a political Balkanization of the state by allowing localities to wall themselves off from surrounding areas and by investing local leaders with the power to override state priorities. Modern political experience indicates that state government is best suited to deal with the general welfare of the populace because only at the state level is there the breadth of opinion needed to harmonize the broad range of competing political and social interests.\textsuperscript{64} The state legislature, drawn from the widest geographical area and the broadest political base in the state, should be able to avoid local bias in its deliberations better than any local government entity.\textsuperscript{65} If the politically weak or unpopular members of a community are to be protected from local oppression, state priorities must be recognized and enforced. Otherwise, localities would be free to victimize the unpopular. The local political process clearly did not serve to protect the interests of welfare recipients effectively in Brown. The survival, on the local level, of programs like the welfare program may well depend upon judicial recognition of the primacy of the state in these matters.

Thus far consideration has focused on the programmatic and political consequences of the holding in Brown. The decision is equally vulnerable when analyzed in terms of the economic realities upon which state and local governments are built. The state is at the heart of the financial structure of government. The state is the sovereign, is vested with exclusive power to authorize taxation, to determine the composition of taxing districts, to limit levies, to restrict debt accumulation and to examine the financial affairs of localities.\textsuperscript{66} The chief asset of any locality is the taxing power granted to it by the state.\textsuperscript{67}

The primacy of the state in financial affairs is reinforced by federal as well

\textsuperscript{62} 140 Ohio St. at 483, 45 N.E.2d at 770-71.
\textsuperscript{63} See note 57 supra and accompanying text.
\textsuperscript{64} See generally Municipal Power, supra note 38 at 710-12. Sandalow argues that "for certain purposes, the municipality's political processes are less adequate than those at the state level." Id. at 710. The reasons for the superiority of state processes include the larger number of voters and interests active at the state level and the reduced likelihood of the existence of a homogeneous population acting upon a shared prejudice. See also Note, Conflicts Between State Statutes and Municipal Ordinances, 72 Harv. L. Rev. 737 (1959).
\textsuperscript{65} See generally Municipal Power, supra note 38, at 710.
\textsuperscript{66} See Williams v. Mayor & City Council of Baltimore, 289 U.S. 36 (1933); State ex rel. City of Toledo v. Cooper, 97 Ohio St. 86, 119 N.E. 233 (1917); Municipal Debt Adjustment, supra note 5 at 212; Clander & Dewey, Municipal Taxation, A Study of the Pre-emption Doctrine, 9 Ohio St. L.J. 72, 84-86 (1948).
\textsuperscript{67} Faitoute Co. v. City of Asbury Park, 316 U.S. 502, 509 (1942).
as state law. Article IX of the Bankruptcy Act\textsuperscript{68} vests the state with the absolute discretion to control the availability of bankruptcy proceedings for localities.\textsuperscript{69} No locality, no matter what its economic condition, can obtain bankruptcy relief in federal court without state approval. This provision of the Bankruptcy Act implicitly recognizes the plenary power of the state in local fiscal affairs and the state authority to insist upon the fulfillment of state mandates for spending. The United States Supreme Court has stated that ceding less authority to the state would rob the state of its ability "to protect the vital interests of the people by sustaining the public credit and maintaining local government."\textsuperscript{70}

By permitting localities to decline to fulfill state-mandated obligations, \emph{Brown} vitiates state authority to control local expenditures. This judicially created option for local repudiation is in direct conflict with the plenary power of the state in matters of local finance, and conflicts with the generally recognized proposition that the state in granting the taxing power can specify the items to be paid for out of the taxes received.\textsuperscript{71}

The ruling in \emph{Brown} also serves to undermine the morale of officials charged with enforcement of state fiscal mandates.\textsuperscript{72} One need look no further than the refusal of the Ohio Attorney General to commence a mandamus action against the Summit County Commissioners after they refused to appropriate funds for general relief in 1976, for confirmation of this proposition.

By freeing a locality to overspend on favored programs and then repudiate other obligations, the \emph{Brown} decision also opens the door to irresponsible spending at the local level. Few creditors will fail to understand the threat implicit in this situation once the claim of any creditor is defeated because of alleged impossibility. In general, localities have not been permitted to control their liability to creditors in contract, or to claimants in tort.\textsuperscript{73} Local authority to regulate local liability has been viewed as an invitation to abuses involving the avoidance of legitimate debts.\textsuperscript{74} In Ohio, as elsewhere, local tort, contract and similar liability is governed by state law rather than by local enactment.\textsuperscript{75} While \emph{Brown} does not on its face empower local officials to pick and choose the debts they will honor, it does open avenues for abuse which have been assiduously avoided in the tort and

\begin{itemize}
\item \textsuperscript{68} 11 U.S.C. §§ 401-418 (Supp. 1977).
\item \textsuperscript{70} Faitoute Co. v. City of Asbury Park, 316 U.S. 502, 512 (1942).
\item \textsuperscript{71} \textit{Id.} at 509.
\item \textsuperscript{72} \textit{See Municipal Debt Adjustment, supra note 5.}
\item \textsuperscript{73} \textit{See generally Municipal Power, supra note 38 at 672-73; Municipal Debt Adjustment, supra note 5, at 310-11.}
\item \textsuperscript{75} \textit{See generally Fordham & Asher, \textit{Home Rule Powers in Theory and Practice}}, 9 \textit{Ohio St. L. J.} 18, 60 (1948).
\end{itemize}
contract contexts. Since local fiscal manipulation can be exceedingly subtle, the Brown decision seems to invite unscrupulous local officials to attempt to juggle budgets in the hope of funding favored programs at the expense of disfavored ones.

As a general rule, localities are not permitted to impose economic or programmatic burdens upon the state government or its agents. Local initiatives that might unduly burden state administrators are restricted by this principle so that state officials will be free to execute the tasks assigned to them under state law and that the cost of carrying out local mandates will not decrease the funds available for state activities. Cases like Brown can have the indirect effect of imposing additional obligations on the state and its agents by forcing the unsupported poor to seek out new homes in localities still providing assistance and by increasing the administrative and related costs which are borne by the state.

The decision in Brown may have an even more direct impact on the state fisc. In Robinson v. Rhodes, general relief recipients whose assistance was suspended pursuant to the action of the Summit County Commissioners sought injunctive relief in federal court to compel the State of Ohio to finance the general relief program in Summit County. The recipients in Robinson argued that general relief was a state program required to be in effect in all parts of Ohio and that Summit county was the agent of the state for the purpose of providing relief. Because general relief was a state-run program available throughout Ohio, the recipients asserted that its suspension in any locality denied those affected the equal protection of the laws as well as rights guaranteed under state law. The federal district court held that both state law and the equal protection clause of the United States Constitution had been violated by the cut-off. The court ordered the Ohio Department of Public Welfare to assume “the administration of the general relief program” and “to pay the entire cost of general relief in said county from the State’s appropriation for relief.”

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78 Id. See also Wilson v. City of East Cleveland, 121 Ohio St. 253, 167 N.E. 892 (1929); Resurrection of the Contract Clause, supra note 74, at 187-91.
77 See Municipal Power, supra note 38, at 679-83.
76 Counties providing public assistance are carrying out a state function. See State ex rel. Ranz v. City of Youngstown, 140 Ohio St. 477, 491, 45 N.E.2d 767, 774 (1942). Thus, any increase in a county welfare budget caused by the failure of another locality to pay its share of welfare costs involves the imposition of additional expense on an agent of the state executing a state function. It should also be noted that certain types of welfare assistance payments vary depending on the locality in which they are dispensed. See Ohio Rev. Code Ann. § 5106.01 (Page 1970). A recipient driven from his home because of the suspension of a benefit program is likely to be attracted to another locality offering higher levels of assistance. If he obtains benefits in this second locality, the total cost of assistance to the state is increased. See, e.g., Municipal Power, supra note 38, at 700.
80 See notes 26-35 supra and accompanying text.
81 424 F. Supp. at 1188-89.
82 Id.
83 Id. at 1187.
84 Id. at 1191.
85 Id. at 1193.
the repudiation by Summit County led directly to state responsibility for the cost of the entire general relief program.

The *Brown* decision is open to still further criticism. Although the Ohio Supreme Court did not identify the source of the doctrine of impossibility other than by reference to *State ex rel. Burgess v. Crabbe*, the underlying principle would appear almost certainly to have been drawn from the realm of contract law. It is a generally recognized proposition of contract law that "impossibility of performance excuses the promisor's duty" to perform. The application of contract law in the context of state and local relations is not warranted. No locality can claim that it has a contractual relationship with the state or that any of its acts are protected from state interference by the contract clause of the Federal Constitution. State governments cannot divest themselves of the authority to govern by means of contractual agreements. Since impossibility is a doctrine born of mutual obligations enjoined by contract, where no contract is permitted and where the sovereign power of the state cannot be negated by agreement, use of the impossibility concept is inappropriate.

One final criticism that may be levelled against the *Brown* decision concerns its vagueness and failure to fashion any standard to guide the courts in subsequent cases. *Brown* never specifies what constitutes an adequate showing of impossibility. It never considers the salient fiscal indicia of impossibility, alternative untapped sources of revenue, or any requirements for good faith on the part of the over-spending locality. The courts are left to pick their way through the tangled thicket of municipal finance with no guidance. Variability of results is inevitable in future cases, and this unpredictability will serve to exacerbate the difficulties faced by local and state governments. The only reliable test, the genuine insolvency of the locality, is nowhere utilized by the court.

III. STATE LEGISLATIVE AND JUDICIAL AUTHORITY TO COMPEL LOCAL PARTICIPATION IN MANDATED PROGRAMS IN OHIO

*Brown* and the cases following it failed to take cognizance of a long line of decisions in the Supreme Court of Ohio which have recognized the authority of the state to compel local participation in obligatory state programs. One of the earliest of these cases was *State ex rel. Southard v. City of Van Wert*, in which the state director of public health sought to compel the City of Van Wert to comply with state directives concerning the disposal of city sewage. In an answer strikingly similar to the one interposed in *Brown*, the city claimed that all available funds were needed "to pay the operating expenses of the city and to retire an already existing debt," that no funds were available

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86 114 Ohio St. 517, 151 N.E. 759 (1926).
90 See generally Municipal Debt Adjustment, *supra* note 5 at 201.
91 126 Ohio St. 78, 184 N.E. 12 (1932).
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... to meet increased sewage disposal costs, and that the city could not raise additional revenue without violating the fiscal limitations imposed by the Ohio Constitution and Ohio General Code. The state director filed a general demurrer to these claims, and the case was then considered by the Ohio Supreme Court. The court noted the mandatory nature of the state-ordered expenditures in issue and the authority of the state to require their payment notwithstanding the "home rule" provision of the Ohio Constitution. The court then turned its attention to the assertion that no funds were available to meet sewage disposal costs because all resources had already been committed to other projects. In rejecting this argument, the court held that state spending mandates took precedence over all "current expenses" save "bonded indebtedness" and that sewer costs had to be met unless taxing and revenue resources were absolutely exhausted in an effort to repay municipal indebtedness. The court recognized the authority of the Ohio General Assembly to require localities to pay state-imposed costs even if such payments caused the disruption of local government programs, stating "[t]hat the Legislature may impose upon a municipality the performance of certain duties of a public nature, and require it either to raise moneys for that purpose or to devote to it revenues already on hand, is well recognized." The court in Southard specifically rejected the proposition eventually espoused in Brown: that expenditure to operate local offices could be made in lieu of appropriations to satisfy a state-imposed obligation. Southard further required that a showing be made that maximum local tax and revenue efforts were being made and that all funds were being used to meet existing mandatory expenses before suspension of a state-mandated program would be contemplated. The Brown court did not consider either of these factors. The Southard court recognized and respected the power of the General Assembly to compel expenditures in all situations save insolvency. It is indeed unfortunate that the Supreme Court of Ohio never discussed Southard, its progeny, or the policy underlying them in the Brown decision.

In State ex rel. Motter v. Atkinson, the Ohio Supreme Court enforced a...

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92 Id. at 79, 184 N.E. at 13.
93 Id. at 81, 184 N.E. at 14.
94 Id. at 84-85, 184 N.E. at 15.
95 Id. at 85, 184 N.E. at 15.
96 Id. at 84-85, 184 N.E. at 15.
97 See, e.g., State ex rel. Hartung v. City of Springfield, 132 Ohio St. 590 (1937) (probable financial hardship is not a defense for municipal refusal to comply with state health department regulations); State ex rel. Strain v. Houston, 138 Ohio St. 203, 215, 34 N.E.2d 219, 225 (1941) ("It is no defense in an action for mandamus, which, if granted, would require a city to incur expense in carrying out some public duty, to say that compliance would leave the city without sufficient funds for other purposes.").
98 City of Cleveland ex rel. Neelon v. Locher, 25 Ohio St. 2d 49, 266 N.E.2d 831 (1971), in which the City of Cleveland refused to enact a statute effectuating a provision of the city charter which would limit the work week of firemen, among others, to 48 hours. The city claimed that the nature of firefighting made such hour limitations impossible. The court rejected this argument and compelled passage of the required statute. The court stated that "[t]he charter provision is clear on its face. If, because of the peculiar circumstances surrounding the operation of the fire department, such a work week is not feasible, the remedy lies in an amendment of the charter, not in a refusal to comply with the present clear dictates of the charter provision." Id. at 52, 266 N.E.2d at 834.
99 146 Ohio St. 11, 63 N.E.2d 440 (1945).

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state mandate requiring local support for juvenile justice services. Atkinson is just one of many cases which have compelled local expenditures for state programs benefitting juveniles notwithstanding a local desire to repudiate them. One of the earliest of these cases was State ex rel. Clarke v. Board of Commissioners in which Judge Clarke requested $1,800 from the Lawrence County Board of Commissioners to run the county juvenile court. The commissioners refused to make an appropriation and declared that there were "no unappropriated or available funds." At a hearing, the commissioners proved that Lawrence County had appropriated all available funds to pay for operations other than those of the juvenile court, that revenue had decreased substantially in relation to prior years and that appropriations for all county offices except one had been reduced significantly. Because of these facts, the county argued that it could not meet the demands of the juvenile court and sought permission to repudiate its statutory obligation. In language very similar to that employed in Southard, the supreme court required the county commissioners to appropriate the mandated funds. The court recognized the "increasing solicitude on the part of the state for wayward unfortunate and neglected children" and emphasized the importance of meeting their problems by an effective statewide juvenile justice program. The court held that the state statute compelled county appropriations and had to be honored. The court thereby rejected repudiation based upon local fiscal difficulties as antithetical to paramount state interests and dangerous to the structure of government. As the court stated:

To maintain the orderly processes of government it is incumbent upon courts to give effect to the statutory law as written, when no question of constitutionality is involved. If Section 1639-57, General Code, in its present wording is unfair and detrimental to the other branches of the county government in that it gives undue preference to one department, rectification is for the General Assembly and not for the courts.

The holding in Clarke has been reaffirmed frequently. In view of the cases vigorously enforcing state-ordered expenditures for juvenile justice services, it is difficult to justify the result reached by the supreme court in State ex rel. Johns v. Board of County Commissioners. In Johns, the

99 141 Ohio St. 16, 46 N.E.2d 410 (1943).
100 Id. at 16, 46 N.E.2d at 411.
101 Id. at 17, 46 N.E.2d at 411.
102 Id. at 18, 46 N.E.2d at 412.
103 Id. at 20, 46 N.E.2d at 412.
104 See, e.g., State ex rel. Motter v. Atkinson, 146 Ohio St. 11, 15, 63 N.E.2d 440, 442 (1945); State ex rel. Foster v. Wittenberg, 16 Ohio St. 2d 89, 90, 242 N.E.2d 884, 885 (1968); State ex rel., Moorehead v. Reed, 177 Ohio St. 4, 7, 201 N.E.2d 594, 596 (1964). The Moorehead court stated, "Respondent urges that there are no unappropriated or unencumbered funds out of which the additional funds could be appropriated, and that to comply with relator's request would work an undue hardship and burden on the other offices and agencies. This does not excuse respondent from fulfilling its mandatory duty." Id. at 6.
105 State ex rel. Johns v. Board of County Commrs, 29 Ohio St. 2d 6, 278 N.E.2d 19 (1972).
supreme court permitted repudiation because of a county's argument that it was "operating at its maximum debt limit and that [it was] without funds sufficient" to make required juvenile justice expenditures. The state law mandating such expenditures was clear, but the supreme court, following the precedent of Brown, allowed county repudiation. No mention was made in Johns of Clarke, of cases following it, of the importance of the juvenile justice program to the state, or of the authority of the General Assembly to establish priorities for the expenditure of local funds.

Were the matter to have rested there, the Johns decision would leave one in a quandry over the continuing validity of Clarke and state authority to mandate juvenile justice expenditures. However, approximately six months after its decision in Johns, the Ohio Supreme Court appeared to reverse itself, albeit sub silentio, in State ex rel. Milligan v. Freeman. In Freeman, the court reaffirmed its holding in Clarke by compelling the Commissioners of Stark County to fund the Stark County juvenile justice system at a level set by the local domestic relations and juvenile court judges pursuant to state law. The majority of the court did not discuss Johns or Brown. Justice Corrigan, who had been the author of Brown, dissented without opinion. From this dissenting vote it can be surmised that Justice Corrigan recognized the inconsistency of Freeman with the decisions in Johns and Brown. Justice Schneider, concurring in Freeman, attempted to distinguish Johns and Brown on the grounds that the respondents in Freeman had neither specifically stated in the pleadings that performance was impossible, as was allegedly the case in Johns, nor that the expenditure would cause the collapse of county government, as was allegedly the case in Brown. This proposed distinction fails to take into account the fact that the county commissioners in Freeman had clearly stated in their pleadings that if they were compelled to expend the sums in issue their "attempt to finance properly the operation of the entire county government structure" would be undermined. Justice Schneider's attempt to distinguish Brown and Johns from Freeman is also open to attack because it fails to face the larger question raised by Freeman: whether localities may repudiate state-mandated spending provisions. The majority of the Ohio Supreme Court relied on and approved Clarke, Atkinson and their progeny in deciding Freeman; all of these cases rejected well-pleaded impossibility defenses. If Clarke and Atkinson were decided correctly, as the majority in Freeman intimated, then Brown and Johns are inconsistent and should not stand.

A review of Ohio cases demonstrates the existence of ample legislative and judicial authority to determine spending priorities, to enforce those priorities,
and to prohibit selective repudiation. The Ohio Supreme Court has on several occasions identified the socially destructive consequences of local selective repudiation and has prohibited repudiation in areas as diverse as sewage treatment and juvenile justice. Based upon these decisions, the validity of the decisions in Brown and Johns must be seriously questioned.

IV. THE DEFENSE OF IMPOSSIBILITY IN OTHER JURISDICTIONS

Courts in a number of jurisdictions outside Ohio have prohibited local repudiation of state obligations. Faced with a severe economic crisis which brought Erie County, New York "perilously close to default on its financial commitments" and which "require[d] drastic cuts in spending programs as well as a substantial real property tax increase," county officials refused to appropriate funds to run social welfare programs. The Commissioner of the New York State Department of Social Services thereupon sued the county officials, demanding that they make the required appropriation. The Appellate Division of New York Supreme Court held in Toia v. Regan that the county had to make its appropriation for social services notwithstanding its fiscal woes. The court carefully analyzed and then rejected the claim of the county that it could not lawfully obtain sufficient funds to pay mandated welfare expenses. The court rejected this assertion in large part because the county had failed to demonstrate that it was taxing at the maximum allowable rate. As an alternative argument, the county claimed that it was an independent political entity vested with the authority to determine its expenditures without interference from the state. In response to this claim, the court stated that "[i]mplicit in the county officials' argument is the assertion that the general right to effective self government is inviolate and that the State may not pass legislation which may to some extent interfere with that right. We do not, however, agree." The court identified a statewide public interest in insuring the maintenance of the welfare program. In rejecting selective repudiation, it compelled county expenditure. The lower court's ruling was affirmed by the New York Court of Appeals and has been followed in a subsequent case.

The courts of California also have compelled localities to fund welfare programs despite local financial problems. In Mooney v. Pickett the

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112 Id.
113 387 N.Y.S.2d at 316.
114 387 N.Y.S.2d at 314.
115 Id.
118 4 Cal. 3d 669, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971).
Supreme Court of California unanimously ordered San Mateo County to provide general assistance to eligible employable single men. The county had claimed that it could not afford to provide such assistance. Justice Tobriner, speaking for the court, stated:

We are aware of the financial difficulties which attend present welfare programs on local, state, and national levels. This Court, however, is not fitted to write a new welfare law for the State of California and while the legislature addresses itself to that task it remains our task to enforce the existing law.

Mooney is one of many California cases that have recognized the mandatory nature of state welfare provisions, and that have enforced state welfare laws to insure continuing public assistance to the poor without interruption because of local fiscal difficulties.

The actions of the New York and California courts contrast sharply with the decision in Brown. The most notable differences are the failure of the Supreme Court of Ohio to consider the tax rate in use in the locality seeking to repudiate, to appreciate the importance of maintaining a statewide welfare program in operation, or to recognize the plenary power of state government to deal with a problem that is statewide in scope.

Outside the welfare context, courts in a number of states have compulsory localities to carry out state-mandated duties despite claims of fiscal impossibility. In a case similar to Southard, the Supreme Court of Pennsylvania rejected the argument that a locality could repudiate its obligation to construct sewage treatment plants. The court held in Commonwealth ex rel. Alessandroni v. Borough of Confluence that a locality's defense that its sewage treatment plans had been "frustrated because of [its] inability to raise the necessary funds . . . by any method authorized by law" was insufficient to excuse performance. The Pennsylvania Supreme Court carefully examined the allegations made by the locality about its economic position, and determined that the locality had not demonstrated that it had "exhausted every possible avenue in an effort to find some way of financing this sewer construction." This, coupled with the statewide importance of pollution control, led the court to reject local repudiation. The Alessandroni court identified the fundamental flaws in the arguments which urge courts to refuse to enforce state spending mandates.

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119 Id. at 680.
120 Id.
121 See, e.g., County of Los Angeles v. Payne, 8 Cal. 2d 563, 66 P.2d 658 (1937); City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.2d 912 (1932); Bellino v. Superior Court, 70 Cal. App. 3d 824, 137 Cal. Rptr. 523 (1977); City and County of San Francisco v. Superior Court, 57 Cal. App. 3d 44, 128 Cal. Rptr. 712 (Ct. App. 1976). Summarizing the California cases, the San Francisco v. Superior Court opinion states, "In each of these cases, the California Supreme Court considered the plight of the taxpayers, but in each case concluded that their burdens were not so grievous as to permit indigents, in the midst of plenty, to go hungry, cold and naked without fault." 57 Cal. App.3d 47, at 128 Cal. Rptr. at 714-15.
123 Id., 234 A.2d at 853.
124 Id.
If we were to hold that financial inability is a defense to an action in mandamus, it would put our Court in the anomalous position of rendering "futile and effectual" [sic] a clearly defined public policy as enunciated by the legislature. . . . Furthermore, such a result would render the courts of Pennsylvania powerless to implement this legislative determination and in effect would sanction the harmful discharge of sewage into the waters of the Commonwealth.\textsuperscript{125}

The concerns articulated by the Pennsylvania Supreme Court were clearly appreciated by the Ohio Supreme Court in \textit{Southard} but ignored without explanation in \textit{Brown}. \textit{Brown} rendered the Ohio General Assembly's mandate "futile" in Franklin County in 1970 and crippled judicial authority to compel local compliance with the state welfare laws upon which many Ohio residents depend for sustenance. While the Ohio Supreme Court deviated from \textit{Southard} without explanation in \textit{Brown}, the Pennsylvania Supreme Court has reaffirmed its \textit{Alessandroni} holding.\textsuperscript{126}

In \textit{State ex rel. Priest v. Gunn},\textsuperscript{127} the Supreme Court of Missouri also enforced state-mandated expenditures notwithstanding local claims of extreme fiscal hardship. The City of St. Louis had refused to appropriate or pay approximately $460,000 for the maintenance of the police department. This amount had been requested as part of a $14 million budget by the members of the Board of Police Commissioners who were authorized by state law to fix mandatory spending levels.\textsuperscript{128} The city claimed that it could not provide the requested funds because it was operating at a deficit and would have to cripple other government departments if compelled to provide the mandated funds to the police department.\textsuperscript{129} The court rejected the city's argument and stated that "[t]he fact that the City operated at a deficit for the first eleven months of the fiscal year, and the needs of its other departments cannot be controlling or even persuasive here."\textsuperscript{130} The court required that the appropriation be made and described the judicial function in such cases as a review limited to a determination of whether the discretion of the Board had been arbitrarily and unreasonably exercised.\textsuperscript{131} This decision is consistent with other Missouri holdings.\textsuperscript{132}

These cases, as well as those from other states,\textsuperscript{133} illustrate judicial

\textsuperscript{125} Id. 234 A.2d at 854 n.4.
\textsuperscript{127} 326 S.W.2d 314 (Mo. 1959).
\textsuperscript{128} Id. at 317-18.
\textsuperscript{129} Id. at 327.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} See, e.g., State \textit{ex rel. Sanders v. Cervantes}, 480 S.W.2d 888 (Mo. 1972); State \textit{ex rel. Rothrum v. Darby}, 345 Mo. 1002, 137 S.W.2d 532 (1940); State \textit{ex rel. Reynolds v. Jost}, 265 Mo. 51, 175 S.W. 591 (1915).
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determination to enforce state spending obligations despite local claims of impossibility. The argument of the Brown opinion that courts do not have the authority to resolve such matters because of political or legal constraints is untenable in the face of such precedents. Courts exercise such authority on a regular basis in resolving all manner of state and local disputes.

Underlying the impossibility argument is the assumption, reasonable on its face, that where there are no available funds, a mandate compelling expenditure is useless or futile. The apparent reasonableness of this notion is undercut by the cases that have enforced fiscal obligations against localities claiming such conditions. As a first principle, these courts have stated that localities claiming impossibility must prove their plight, must account for each dollar of possible revenue, and must devote available funds to state mandates on a priority basis. If funds can lawfully be raised or diverted to meet mandates, these steps must be taken. In Brown and Johns, this first principle was breached. In both cases the court did not even look at the available revenue resources or at the spending priorities established by state law.

A second principle established by cases which have rejected claims of impossibility is that courts must enforce state mandates if the fabric of government and the authority of the judiciary are to be preserved. Again and again the courts of states other than Ohio have declined to adopt the doctrine of impossibility because of its destructive impact upon legislative and judicial authority. In contrast, the Ohio Supreme Court in Brown denied the General Assembly the authority to designate spending priorities and to have them enforced. It also deprived the courts of the authority to enforce clearly enunciated state law.

Finally, it is remarkable to note that, despite anguished cries from localities, when mandates have been enforced money has been found to make required appropriations. Finding funds may be difficult or cause dislocations, but it would appear that it can almost always be managed. In those few cases where fiscal resources are simply not available, the defense of impossibility would seem one of the least attractive solutions available. Impossibility encourages local officials to utilize an ad hoc decision-making process to determine the fate of programs designated as fundamental by the state legislature. Such solutions may avert collapse temporarily, but they do nothing to resolve the fundamental problems facing the locality and can play havoc with carefully structured social benefit schemes.

A much wiser course for the judiciary to follow is to enforce local obligations. If state mandates literally cannot be met, intense political pressure is likely to be focused upon state lawmakers to fashion appropriate solutions. This is apparently what happened when New York City approached the brink of fiscal collapse and was "saved" by the State of New York. The "bailout" of localities may not always be achieved in this

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134 See notes 111-133 supra and accompanying text.
manner, but, should collapse occur, the risk of economic injury is distributed evenly among all local residents rather than being focused upon a disfavored few whose programs are sacrificed. If there is a total collapse, the recently amended Article IX of the Bankruptcy Act provides a method to restore the locality to fiscal health. If insolvency is the real issue, it should be approached candidly and the laws enacted to deal with it should be utilized to the fullest.

V. CONCLUSION

An examination of cases from Ohio and other states suggests that for at least two reasons the Ohio Supreme Court was in error when it sanctioned the local fiscally-motivated repudiation of state-mandated programs. First, repudiation was approved by the supreme court without adequate consideration of available resources and of priorities previously set for spending of those resources. Second, the court's action undermined the ability of the state legislature to establish statewide programs and the ability of the judiciary to enforce such programs. These results suggest that a re-examination of the holding in the case is in order. Re-examination also seems warranted in light of the cases from Ohio and other states which have rejected the impossibility defense.

Were the decision merely a technical aberration, its importance, although not insignificant, would not be fundamental. Unfortunately, it may be much more significant and troublesome. Because welfare recipients and other insular minorities are often the target of local animosity, the courts must be, and have been, especially diligent in enforcing state policies having the effect of benefiting them. The approach of the Ohio Supreme Court in is diametrically opposed to the special judicial function of protecting minorities. If anything, the supreme court has assisted those seeking to oppress the politically powerless. If a result such as that reached in were based on thorough factual analysis or were the product of prior precedent, it might be beyond reproach. is the product of neither. It does not take into account either fundamental factual issues or pre-existing law. For these reasons, it suggests a possible judicial animus against the poor.

That welfare expenditures are a great burden is clear. That they create difficulty on the local level is also clear. But, to borrow an idea from a pre- opinion of the Ohio Supreme Court, adjustment of these difficulties is not vested in the courts but "is wholly within the province of the General Assembly." By ignoring statutory law, precedent and fundamental factual considerations, the court in arrogated to itself improper powers. It, in effect, exercised these powers to legislate out of existence the mandatory requirements of the welfare law. That it had no authority to do so seems clear. The court may have recognized as much in the Freeman case.

The decision, however, remains an open invitation to local officials to attempt to repudiate state-mandated obligations. At least in the welfare

139 State ex rel. Motter v. Atkinson, 146 Ohio St. 11, 16, 63 N.E.2d 440, 443 (1945).
context, there is still every possibility that repudiation will succeed. The results are the victimization of a weak and insular minority which cannot protect itself, and the demoralization of the law enforcement officers of the state. Based upon the results in Brown, public officials refused in the recent case in Summit County, *Cain v. Birkel*, even to bring a mandamus action to challenge local repudiation. Because of *Brown*, general relief recipients were deprived not only of public assistance but of the efforts of state officials to enforce the law on their behalf. Such an erosion of the rule of law has the most serious implications for government in Ohio.

At least one other conclusion that may be drawn from the *Brown* decision is that it demonstrates the declining capability of localities to deal effectively with the financial problems inherent in governing. Localities in Ohio have had an increasingly hard time financing their operations. In the face of these difficulties, no action has been taken to reform government financial structures. The increased centralization of programs of all kinds, the imposition of more programs and more costly programs, and the ever increasing need for state and federal aid all suggest that management and finance by local government units are now fiscally impractical. Despite our fears of big government, we may no longer be able to afford the luxury of localism, especially in government finance, since its costs apparently are program disruption and suffering for the weakest members of society. The advantages of localism are said to include efficiency, local freedom of choice and power to innovate. These are all substantially reduced when fiscal crisis arises. We could perhaps return to an era of decentralization in government but in our interdependent and highly coordinated society, this seems both anachronistic and unlikely. Under prevailing conditions, the wiser course would seem to be economic integration which casts the fiscal burdens on the state. By allowing local repudiation of state mandates, the Ohio Supreme Court takes pressure off the legislature to deal with the problem, and permits the present system to limp listlessly along. That enforcement is better than evasion and reform better than delay seems apparent. The sooner the judiciary forces the legislature to take cognizance of these problems and to work toward their solution the better for all concerned.

140 See generally J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 15 (1970). Although directing their attention primarily to public schooling in America, the authors of this volume fully discuss the advantages alleged to arise because of local governance.

141 In a fiscal crisis there are no resources available for innovation, program choices are reduced or foreclosed and efficiency is rendered virtually meaningless.