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Shedding Light on Dark Stores

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Overview

Over the past year, Wisconsinites have increasingly encountered the term “dark stores”—whether in their newspapers or newsfeeds, at community meetings, or during legislative hearings. Lawmakers considered several related bills during the 2017 session and will likely consider new proposals on the subject during the upcoming 2019 session.¹ In the meantime, voters in several counties will be asked to approve or reject referenda on the issue on November 6, 2018.² Ahead of these developments, this publication provides basic information about the concept of dark stores to inform legislators and their constituents alike. It defines dark store theory, summarizes arguments for and against it, highlights relevant court cases, outlines other states’ responses, and discusses recent legislative proposals.

Background

The phrase “dark store theory” evokes the complexities of property tax law, yet a fairly simple question lies at the heart of this issue: What standards should local and state authorities follow to determine commercial property values? This section provides a brief synopsis of current approaches to tax assessment before explaining the challenge dark store theory poses to them.

Property owners across the country pay taxes based on a local tax assessor’s determination of the value of their property. How do they arrive at specific dollar amounts? Assessors consider a wide range of criteria, adhering to section 70.32 of the Wisconsin Statutes, and the most recent *Wisconsin Property Assessment Manual*. The City of Madison, for example, lists the following considerations: “what properties similar to it are selling for, what it would cost today to replace it, how much it takes to operate and keep it in repair, what rent it may earn, and . . . the current rate of interest charged for borrowing the money to buy or build properties.”³ These criteria fall under three general approaches to property valuation:

- **Cost**, i.e., the total replacement cost of land and construction, minus depreciation
- **Income**, i.e., financial returns generated from use of the property
- **Sales comparison**, i.e., recent selling prices for similar properties

1. Members of the legislature studied the issue as part of the 2018 Legislative Study Committee on Property Tax Assessment Practices, chaired by Senator Luther Olsen. See Wisconsin Legislature, “2018 Legislative Council Study Committee on Property Tax Assessment Practices,” last accessed September 11, 2018, <https://docs.legis.wisconsin.gov/>.

2. Wisconsin Policy Forum has identified referenda taking place in Outagamie, Washington, and Kenosha Counties. Wisconsin Policy Forum, “Are ‘Dark Store’ Property Tax Challenges on the Rise?” *Focus* 16 (2018), <https://wispolicyforum.org/>.

3. City of Madison assessor’s office, “Assessor Duties,” accessed July 11, 2018, <https://www.cityofmadison.com/>. As another example, the City of Kenosha assessor’s office considers “what similar properties are selling for, what it would cost to replace your property, the rent it may earn, and any other factors that affect value.” City of Kenosha—Department of the City Assessor, “Frequently Asked Questions,” accessed September 12, 2018, <https://www.kenosha.org/>.

The Wisconsin Statutes, the *Manual*, and recent court decisions address when and how to use these different approaches. Generally, assessors begin with the sales comparison approach, however, as complications arise, they may potentially consider a variety of factors.⁴

These methodologies remained largely unchallenged until the past decade, when large national retailers—often called “big box stores”—increasingly contested their property tax assessments.⁵ These companies argue that cost and income approaches artificially inflate commercial property values. By their logic, the cost or income estimate overstates the value of a property that—in retailers’ parlance—becomes **functionally obsolete** the moment construction ends. As an example, Home Depot may expend \$5 million to build a new store, but in tailoring the store to its particular needs, the company makes it less likely to suit a future buyer or renter, who may have no need for wide aisles equipped to stack lumber. As a result, the company anticipates selling the property at a loss—say, perhaps, for \$2 million.⁶ Experts demonstrate this idea in relatable terms with the example of a hypothetical homeowner who invests thousands of dollars to redo his or her living room as a racquetball court; these costs only drive down the selling price of the home, as prospective buyers anticipate spending a great deal to restore the home to a more usable condition.⁷

Against this backdrop, proponents of dark store theory advocate for the sales comparison approach. They maintain that property taxes must reflect value-in-exchange (how much the property will generate from future resale) versus value-in-use (how much the property generates in income for the present owner). Local assessors often share a similar stance; however, the sticking point remains *how* assessors determine value-in-exchange. Big box retailers and local communities make competing claims about **comparables**, i.e., the properties used as points of comparison to determine the value of a particular property. City and county assessors often look to **first-generation spaces** as comparables: other big box stores that are owned and operated by the retailer who originally oversaw their construction. For example, an assessor valuing a CVS might look to the original purchase price of a nearby Walgreens. But retailers advocate for use of **second-generation spaces** as comparables: vacant big box stores or those reoccupied by new tenants or

4. The following blog post from the University of North Carolina School of Government provides a useful breakdown of valuation approaches and recent court conflicts surrounding them. Rebecca Badgett, “[The State of the Dark Store Theory](#),” *Coates’ Canons: NC Local Government Law*, posted May 8, 2018, <https://canons.sog.unc.edu/>. See also “Chapter 9: Real Property Valuation” in Wisconsin Department of Revenue, *Wisconsin Property Assessment Manual* (2018).

5. Ashley Schieck of Tarleton State University in Texas identifies the earliest uses of this theory as taking place in Detroit, Michigan, around the tax assessment of car manufacturing plants. Ashley Schieck, “Big-Box Stores and the Dark Store Theory—A Changing of the Tide?” *Real Estate Taxation*, 2nd Quarter 2017, 128–133.

6. Tim Wilmath and Pat Alesandrini, “[Thinking Outside the Big Box](#),” *Fair and Equitable*, November 2015, <https://www.iaao.org/>.

7. The office of the Texas comptroller provides a useful explanation of this theory and its appeal to large retailers. Joyce Jauer, Olga Garza, and Bruce Wright, “[Dark Store Theory’ and Property Taxation](#),” *Fiscal Notes*, February 2017, <https://comptroller.texas.gov/>.

owners.⁸ For example, CVS might select as comparables a vacant or “dark” Walgreens or a former Rite Aid in current use as a furniture store. As this distinction suggests, retailers believe assessment practices need not account for whether comparables are active or inactive, “operating or shuttered.”⁹ The term **dark store theory** simply refers to this argument—one that advocates frame as a distinct and permissible interpretation of existing property tax law.

Complicating matters further, many major retailers contract out the construction of stores to third parties, and subsequently operate their stores under leases. (The vast majority of big box pharmacy chains in Wisconsin are owned and operated under this model.)¹⁰ Rents paid to these third parties, retailers say, should not be considered as income for assessment purposes because they often exceed fair market rates.¹¹ Strictly speaking, companies do not invoke dark store theory to contest their tax assessments in these instances. Nevertheless, these challenges further illustrate retailers’ fundamental disagreement with assessors about the methodologies employed to value commercial properties, and their outcomes serve as important barometers of judicial receptiveness to dark store theory.

Arguments for and against

Why should assessors ignore the income and cost approaches to valuation? “Retailers argue that their stores have been specially constructed to accommodate their particular needs,” explains Bloomberg’s Michael Bologna, “rendering them less valuable to second-generation users.”¹² Stores tailor-made to suit a particular purpose—like selling hardware—often prove difficult to resell or rent after they close, particularly because major retailers “generally refuse to sell or lease closed locations to their rivals.” Most deeds include restrictive agreements barring the most likely buyers, like Home Depot in the case of Lowe’s. As a result, companies anticipate selling their properties at a significant loss.¹³ Moreover, the same companies point out that they create and sustain jobs within communities—for example, Meijer employs more than 3,000 in Wisconsin—and should not be simultaneously penalized “for adhering to a perfectly legal . . . appraisal

8. Wilmath and Alesandrini, “Thinking Outside the Big Box,” 4.

9. Jauer, Garza, and Wright, “‘Dark Store Theory’ and Property Taxation.”

10. According to the League of Wisconsin Municipalities, “More than 80% of Walgreen [sic] stores and 95% of CVS stores operate under a lease arrangement.” League of Wisconsin Municipalities, “Issue Briefing: Dark Store and Walgreens Decisions Tax Shift,” accessed September 12, 2018, <http://www.lwm-info.org/>.

11. Jauer, Garza, and Wright, “‘Dark Store Theory’ and Property Taxation.” See also Liz Farmer, “Big-Box Stores Battle Local Governments over Property Taxes,” *Governing*, September 2016, <http://www.governing.com/>. For an in-depth explanation of leased fee versus fee simple valuation, see Judy S. Engel and Lynn S. Linné, “Dark Store Theory—How to Stop It from Coming to a State Near You!” *Insights*, Summer 2016, <http://www.willamette.com/>.

12. Michael J. Bologna, “States Forced to Address ‘Dark Store’ Valuation Theory,” *Bloomberg BNA*, June 29, 2017, <https://www.bna.com/>.

13. Jauer, Garza, and Wright, “‘Dark Store Theory’ and Property Taxation.”

approach.”¹⁴ Heavy tax burdens, their advocates add, may “scare away businesses” at the very same moment that competition from e-commerce has shuttered many brick-and-mortar stores.¹⁵

While retailers champion the dark store theory, counties and municipalities tend to oppose it. Critics observe that under this theory active stores generating income are assessed similarly as dark stores, even while benefitting from services and infrastructure like roads, public transportation, utilities, emergency response systems, and police protection.¹⁶ They also object that the comparison of active and dark stores wholly ignores the value of location, sidestepping the fact that active stores benefit from well-trafficked, economically viable neighborhoods, whereas vacant stores often go dark as the result of poor placement.¹⁷ Detractors cast retailers’ difficulty reselling properties as a problem of their own making, easily avoided with less restrictive deed agreements. Vacant stores, they add, pose greater disadvantages to local communities than they do to companies themselves, whether by inviting vandalism or driving down the value of nearby residential properties.¹⁸ Finally, local authorities question whether retailers report higher values for their properties in other contexts, such as income tax returns, securities filings, and reports to shareholders—and ask whether these reported values should also be used for property tax purposes.¹⁹

Most importantly, critics argue that when retailers pay fewer taxes, residential property owners shoulder increasing burdens, either paying increased taxes or undergoing reductions in services. Michigan, for example, has seen a steep decline in property tax revenue, amounting to about \$100 million by some accounts.²⁰ Those decreases translate to sharp cuts, like reduced library hours.²¹ The League of Wisconsin Municipalities estimates that if dark store theory takes hold across this state, places like Pleasant Prairie may experience losses of as much as 14 percent, which may incur a 17 percent tax rate increase to residents. In relatable terms, the League translates these figures to an average increase of \$892.50 per home per year on residential property taxes.²² Other opponents

14. 2018 Legislative Council Study Committee on Property Tax Assessment Practices Hearing, August 7, 2018 (testimony of Bob Vujea, property tax manager, Meijer), <https://docs.legis.wisconsin.gov/>.

15. Journal Times Editorial Board, “The complicated dark store issue,” *The Journal Times*, September 10, 2018, <https://journaltimes.com/>.

16. International Property Tax Institute, “IPTI Xtracts USA,” December 2017, <http://www.ipti.org/>, 4.

17. Jauer, Garza, and Wright, “‘Dark Store Theory’ and Property Taxation.”

18. Wilmath and Alesandrini, “Thinking Outside the Big Box.”

19. Anna Henning and Scott Grosz, “Wisconsin Legislative Council Study Committee Memorandum,” October 4, 2018, 2–3, <https://docs.legis.wisconsin.gov/>.

20. Mary Ann Barton, “Counties fighting ‘dark store’ math by big box retailers,” *CountyNews*, May 12, 2017, <http://www.naco.org/>.

21. Gordon Evans, “WSW: How the ‘Dark Store’ Theory Leads to Lower Property Tax Bills,” *WMUK*, August 24, 2015, <http://wmuk.org/>. For a discussion of potential implications of dark store theory in Wisconsin, see Madeleine Behr, Doug Schneider, and Haley BeMiller, “Wisconsin stores say they want fair property taxes; cities say that could cost you,” *Appleton Post Crescent*, December 14, 2017, <https://www.postcrescent.com/>.

22. League of Wisconsin Municipalities, “Tax Shift to Residential,” accessed July 18, 2018, <https://www.lwm-info.org/>, and

suggest that this theory of valuation jeopardizes local business owners who pay higher taxes than large, national retailers.²³ Communities resolved to fight back against dark store theory may exhaust their already scant resources to this end. One county in Texas, for example, devoted upwards of \$300,000 in its legal dispute with Lowe’s.²⁴ Even when banded together, individuals lack the power and resources that big box retailers typically have at their disposal. Within Wisconsin, tax appeals rose from 63 in 2016 to 79 in 2017 on the basis of survey results completed by 215 local communities.²⁵ Even if successful, municipalities must make up for the sunk costs of litigation.

Of course, residential property owners may also contest their own tax valuations, adopting the “If you can’t beat them, join them” strategy. But individuals are less likely to be successful in these efforts because arguments about comparables are unconvincing when applied to residential property valuations.²⁶

Table 1. Litigation costs of tax appeals, city of Wauwatosa (2017)²⁷

Year	Litigation costs	Estimated loss of value ²⁸
2013	\$235,000	\$2,916,417
2014	\$378,000	\$2,784,941
2015	\$170,000	\$4,066,525
2016	\$572,000	\$4,493,746
2017	\$763,000	\$218,157,390

Recent court decisions

Although dark store theory increasingly commands the attention of state legislators, most significant developments have occurred in the courts. Major retailers continue to contest property assessments and often manage to defend their claims successfully. The following list highlights a few key court decisions over the past decade, presented in roughly chronological order. These decisions furnish context for understanding the legislative proposals discussed in the final section of this publication.²⁹

Wisconsin. One of the most notable decisions around dark stores within the state

²³ “Issue Briefing: Dark Store and Walgreens Decision Tax Shift,” *supra* note 10.

²⁴ According to the Michigan Association of Counties, the average commercial tax rate exceeded the average rate for big box stores by 72 percent in Oakland County, Michigan, as of 2015. Michigan Association of Counties, “[Issue briefing: Dark Stores](https://marquette.org/),” accessed July 24, 2018, <https://marquette.org/>.

²⁵ Jauer, Garza, and Wright, “Dark Store Theory’ and Property Taxation.”

²⁶ Wisconsin Policy Forum, *supra* note 3.

²⁷ Wilmath and Alesandrini, “Thinking Outside the Big Box,” 4.

²⁸ 2018 Legislative Council Study Committee on Property Tax Assessment Practices, August 7, 2018 ([handout accompanying testimony of Shannon Krause](https://docs.legis.wisconsin.gov/), assessor, City of Wauwatosa), <https://docs.legis.wisconsin.gov/>.

²⁹ These figures reflect the city’s assessment of a particular property, less the taxpayer’s opinion of value on appeal.

³⁰ For a useful synopsis of cases in a few of these states and North Carolina, see Badgett, “The State of the Dark Store Theory,” *supra* note 4.

concerns the assessment of stores built under contract with third-party developers and subsequently leased back from those developers.³⁰ Walgreens operated two retail locations in Madison under this type of arrangement, with 60-year leases that obligated the company, rather than the property owner, to pay property taxes. In assessing these two properties, the City of Madison employed the income approach, considering Walgreens' actual lease payments as a form of income. Walgreens objected, contending that those payments vastly exceeded market values. These elevated lease payments, Walgreens explained, reflected additional expenses associated with the initial sale-leaseback transaction, like land purchase, construction costs, development, and financing. Although lower courts found in the city's favor, the Supreme Court of Wisconsin eventually reversed those decisions in July 2008. In so doing, the court looked to section 70.32 (1) of the Wisconsin Statutes, which directed assessors to value properties "in the manner specified in the Wisconsin property assessment manual." That manual, prepared by the Department of Revenue, specified that assessors should "use the market rent, not the contract rent" of a leased property.³¹ On this basis, the majority ruled in Walgreens' favor.³² Justice Shirley Abrahamson concurred, but offered a separate opinion suggesting that "[t]he court is not bound by the *Manual*."³³

This ruling prompted an uptick in assessment challenges throughout the state.³⁴ The decision also affirmed the power of the legislature to establish rules around tax assessment. As the justices put it, "The power to determine the appropriate methodology for valuing property for taxation purposes lies with the legislature."³⁵ Finally, the opinion made cursory mention of the uniformity clause of the state constitution, but did not state whether the City of Madison's assessment had violated that provision (discussed later in this publication). The implications of dark store theory for the uniformity clause thus remain an open question.

Ohio. On the heels of the *Walgreens* decision, the Supreme Court of Ohio ruled differently on a similar case. The retailer, Meijer, had contested a local school district board's assessment of a newly constructed property for the year 2003, asserting its value to be \$9.5 million in lieu of \$13 million. The Ohio Board of Tax Appeals found in the board's favor, and the state supreme court heard the case on appeal.³⁶ Its 2009 opinion described the conflict as reflecting a "fundamental dispute" in valuation methodologies. On the

30. As mentioned earlier, tax assessment challenges in these particular instances do not fall strictly under the category of dark stores, but their outcomes have important implications for dark store theory.

31. *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶ 82, 311 Wis. 2d 158, 752 N.W.2d 687.

32. *Id.*

33. *Walgreen Co.*, 2008 WI at ¶¶ 98–99.

34. Badgett, "The State of the Dark Store Theory." Since then, Wisconsin Policy Forum has confirmed this uptick. See Wisconsin Policy Forum, "Are 'Dark Store' Property Tax Challenges on the Rise?"

35. *Walgreen Co.*, 2008 WI 80 at ¶ 19.

36. *Meijer Stores Ltd. P'ship v. Franklin Cty. Bd. of Revision*, 122 Ohio St. 3d 447, 2009-Ohio-3479, 912 N.E.2d 560.

one hand, Meijer claimed that the store “[added] only modest market value because the structure would not be easily adaptable to the needs of a potential buyer,” who would be “hard-pressed to utilize such a large space for their own business.” In short, Meijer characterized the store as functionally obsolete. Accordingly, its appraiser selected several abandoned Kmart stores as comparables. On the other hand, the local board selected newly constructed first-generation spaces as comparables.³⁷ The court affirmed the lower court’s ruling, noting that the store in question “is located in a retail corridor that is both flourishing and growing,” and thus could not be accurately compared to vacant Kmart stores.³⁸ This precedent diverged sharply from the one *Walgreens* set in Wisconsin.

Indiana. Here, Meijer led the campaign for dark store theory as early as 2006, when the retailer contested a local assessor’s valuation of a store in Wayne County. The company’s attorneys made a case for functional obsolescence, gesturing to “the limited number of buyers for properties of this size and an oversupply of big-box properties within the retail market.”³⁹ The Indiana Board of Tax Review rejected this argument, but the Indiana Tax Court ultimately reversed in 2010, finding that Wayne County had not presented “market-based evidence that impeached Meijer’s appraisal and supported its own assessment.”⁴⁰

In Marion County, Meijer once again disputed assessments for the years 2002–03 and 2006–12. The local assessor valued the property in question between \$15 and \$20 million, but Meijer requested lower figures ranging between \$7 and \$11 million. As in similar cases, both parties relied on the sales comparison approach, but disagreed on the use of comparables. For example, Meijer noted that one comparable property boasted signage visible from highly trafficked roads, whereas its store did not. Ultimately, the Indiana Board of Tax Review concluded that Meijer’s appraiser provided “the most probative evidence of the subject property’s true tax value for each year,” and approved the reductions Meijer had requested.⁴¹ Meijer depicted this conflict as a “test case” for dark store theory that would authorize the company to contest assessments throughout the state. Whether that prediction would bear out, the county found itself burdened with \$2.4 million in back taxes because the decision applied retroactively.⁴²

Subsequent court challenges “[invited] the Court to reconsider—and abandon—its holdings” in cases like those detailed above.⁴³ For example, Kohl’s challenged assessments

37. *Meijer Stores Ltd. P’ship*, 122 Ohio St. 3d 447 at ¶¶ 7–9. Although the court did accept this comparison’s use of sales-lease transactions, these arrangements typically make both the sales and income approaches more complicated. For more on those complications, see the following: IAAO Special Committee on Intangibles, “[Understanding Intangible Assets and Real Estate: A Guide for Real Property Valuation Professionals](https://www.iaao.org/),” November 12, 2016, 14, <https://www.iaao.org/>.

38. *Meijer Stores Ltd. P’ship*, 122 Ohio St. 3d 447 at ¶ 15.

39. *Meijer Stores Ltd. P’ship v. Smith*, 926 N.E.2d 1134, 1138 (Ind. T.C.).

40. *Meijer Stores* 926 N.E.2d 1134 at 1139.

41. *Meijer Stores LP v. Marion County Assessor*, Ind. Bd. of Tax Rev. (December 1, 2014), 49, <https://www.in.gov/>.

42. Farmer, “Big-Box Stores Battle Local Governments over Property Taxes.” See also Kathleen McLaughlin, “[Meijer tax ruling may reverberate statewide](https://www.ibj.com/),” *Indianapolis Business Journal*, January 17, 2015, <https://www.ibj.com/>.

43. *Howard Cty. Assessor v. Kohl’s Ind. LP*, 57 N.E.3d 913, 919 (Ind. T.C.). Those invitations include *Meijer Stores Ltd.*

of a store in Howard County for the years 2010–12, arguing for the use of dark stores as comparables. Here, the Indiana Tax Court firmly stated that “[t]he Court . . . does not believe it ‘got it wrong’” and would stand by its earlier holdings.⁴⁴ It decided in favor of Kohl’s, granting its request for a lower assessment of around \$3.7 million.⁴⁵ Although the county appealed, the Supreme Court of Indiana denied review of the case in April 2017.⁴⁶

Michigan. When the City of Escanaba valued a Menards store around \$8 million in 2012–14, the company countered the city’s assessment with a claim that the store was worth less than half that amount, or about \$3.3 million. To reach this conclusion, the company’s appraiser relied on the sales-comparison approach, comparing the Menards to eight other properties in southeast Michigan, including a Walmart, a Home Depot, and a former Circuit City. The appraiser also rejected the cost approach, arguing that the building was functionally obsolete from the moment of its completion since it would suit Menards’ needs only. In response, Escanaba’s city assessor objected that those properties were subject to deed restrictions limiting their future use and thus driving down their resale prices. The Michigan Tax Tribunal initially found in favor of Menards, but the Court of Appeals of Michigan reversed the tribunal’s judgment in May 2016:

There was no evidence in the record of any deficiency in the subject property that would inhibit its ability to properly function as an owner-occupied freestanding retail building. The functional obsolescence to which Menard refers appears to be the fact that, due at least in part to self-imposed deed restrictions that prohibit competition, such freestanding retail buildings are rarely bought and sold on the market for use as freestanding retail buildings.⁴⁷

This decision constituted a win for opponents of dark store theory; however, as one researcher cautions, “don’t let the outcome of the Michigan case fool you.”⁴⁸ In Michigan, this ruling followed others that favored big box retailers.⁴⁹ “Tax courts in Michigan,” writes Liz Farmer in *Governing*, “have generally agreed with retailers that properties were being overvalued.” Still, Farmer positions this ruling as a potential “turning point” that may presage changing legal interpretations.⁵⁰

P’ship, 926 N.E.2d at 1134 (Ind. T.C.); *Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496 (Ind. T.C.); *Millennium Real Estate Inv., Ltd. Liab. Co. v. Assessor Benton Cty., Ind.*, 979 N.E.2d 192 (Ind. T.C.).

44. *Howard Cty. Assessor*, 57 N.E.3d at 919 (Ind. T.C.).

45. *Id.* at 914.

46. *Howard Cty. Assessor v. Kohl’s Ind. LP*, 86 N.E.3d 171.

47. *Menard, Inc. v. City of Escanaba*, 315 Mich. Ct. App. 512, 531, 891 N.W.2d 1.

48. Badgett, “The State of the Dark Store Theory.”

49. See, for example, *Lowe’s v. Grandville*. In this case, the Court of Appeals of Michigan accepted Lowe’s Home Centers’ use of the sales comparison approach and rejected the city’s contention that Lowe’s based its valuation on a hypothetical future sale “that Lowe’s had no intention of making.” *Lowe’s Home Ctrs. v. City of Grandville*, 2014 Mich. App. LEXIS 2618, 13 (Ct. App.). For a summary of relevant court decisions in Michigan, see Engel and Linné, “Dark Store Theory,” 58.

50. Farmer, “Big-Box Stores Battle Local Governments over Property Taxes.”

Recent legislation

Dark store theory has gained increasing media scrutiny, but state legislation on the subject remains somewhat scant. Legislators have introduced bills in Indiana, Michigan, Texas, and Wisconsin, but are only beginning to examine the issue in states like Kansas and New York.⁵¹ For the most part, legislative action is reactive; representatives seem more likely to address the issue in those areas where retailers have put dark store theory into practice and constituents have consequently shouldered the costs of litigation.

As a caveat, comparing proposed legislation and enacted laws across states poses some challenges. State tax codes vary widely, largely because of constitutional clauses governing taxation. Many state constitutions—Wisconsin’s among them—include provisions requiring uniform taxation. However, some of these “uniformity clauses” are more flexible than others. Minnesota, for example, requires uniformity of taxation within “the same class of subjects,” a qualification that grants legislators more flexibility to craft creative tax legislation. By comparison, Wisconsin’s uniformity clause is restrictive—as discussed in the final section of this publication—raising some barriers to straightforward legislative solutions.⁵²

Indiana. In this state, litigation around dark store theory prompted legislative action during the 2015 session. Legislators ultimately passed 2015 Senate Bill 436, which required tax assessors to employ the cost approach in valuing most first-generation big box stores occupying 50,000 square feet or more. For big box properties valued using the sales approach, bill language restricted the use of comparables to buildings “vacant for more than one (1) year as of the assessment date” or with “significant restrictions placed on the use of the real property by a recorded covenant, restriction, easement, or other encumbrance on the use of the real property.”

But the legislature dramatically reversed course the following year. New legislation, Indiana House Bill No. 1290, repealed the provisions outlined above. (Legislators may have been concerned that these provisions—which applied selectively to a certain class of retail properties—would be found unconstitutional under the state’s uniformity clause.)⁵³ And if opponents of dark store theory anticipated a more successful outcome in the courts, they instead met with disappointment; the court decisions outlined in the

51. Stephen Koranda, “Big Box Stores Say Kansas Property Taxes Should Be Based on Vacant Building Value,” *KCUR*, April 4, 2018, <http://kcur.org/>. See also, in the case of Kansas, Stephanie Casanova, “Local leaders work together against dark store theory,” *The Mercury*, June 28, 2018, <http://themercury.com/>. In many states, counties associations are at the forefront of calls to consider the issue within state legislatures. See, in the case of New York, New York State Association of Counties Standing Committee on Taxation and Finance, “Resolution Urging the Governor and New York State Legislature to Enact Legislation to Eliminate the ‘Dark Store Theory’ in New York State Real Property Tax Law as a Way to Reduce Property Assessments in Tax Certiorari Proceedings,” NYSAC January 2018 Legislative Conference, accessed July 26, 2018. The full text of the resolution can be found [here](#). See also a National Conference of State Legislatures memo on dark store legislation prepared for the 2018 Legislative Council Study Committee on Property Tax Assessment Practices.

52. The uniformity clause generally requires uniform taxation of property. See Joe Kreye, “The Uniformity Clause,” *Reading the Constitution*, Wisconsin Legislative Reference Bureau (October 2016), 2, <https://docs.legis.wisconsin.gov/>.

53. See Ind. Const. art. X § 1.

“Recent Court Decisions” section of this publication largely favored big box retailers over counties.

Michigan. As in Indiana, pitched legal battles stirred legislators to act on the issue. During the 2015 legislative session, Representative Scott Dianda introduced House Resolution 133, “[urging] the Governor and State Tax Commission to conduct a statewide impact study on the current and future effects of the ‘dark store’ tax method.” The text of the resolution drew attention to how retailers were “redefining what is comparable property,” leveraging their own “self-imposed deed restrictions,” and attempting to “retroactively lower their property tax assessments.” These actions, it continued, resulted in “devastating cuts to essential services.” Despite mounting concern, the resolution was not adopted.

During the same session, Representative David Maturen introduced House Bill 5578, establishing detailed standards for the Michigan Tax Tribunal, including restrictions on the use of vacant properties as comparables. The bill passed by a wide margin in the House, only to languish in the Senate Finance Committee until the conclusion of the session.⁵⁴ The following session, Rep. Maturen reintroduced similar legislation, House Bill 4397, with significant bipartisan support. However, the bill has not moved out of the House Committee on Tax Policy.

Texas. Legislation has faced similar obstacles in Texas, where 2017 House Bill 27, introduced by Representative Drew Springer, never reached the floor of either house. The original bill text stated that to be considered a comparable for purposes of assessment, “a property must have the same highest and best use as the subject property.” In other words, the legislation proposed to limit the use of vacant properties as comparables since inoperative stores could not be considered to fulfill a property’s maximum potential (i.e., its “highest and best use”). The bill would also enable assessors to ignore use restrictions in determining a property’s “highest and best use.”

A fiscal note accompanying the original bill text noted that “actual gains” were difficult to predict, but “probable net positive impact to general revenue related funds” could amount to as much as \$221 million by 2021. With these gains in mind, city and county associations registered in favor of the legislation in a committee hearing. But other groups—including the Texas Association of Manufacturers, Texas Association of Realtors, and Texas Taxpayers and Research Association—lobbied against the legislation, which they believed to be “too broad” and likely to “ensnare other properties that weren’t used for retail.”⁵⁵ (Bill language was indeed quite imprecise by comparison to the Indiana legislation mentioned above, which singled out retail stores according to square footage.)

54. Paula Gardner, “New law would challenge Michigan’s big box stores seeking lower tax rates,” *Michigan Live*, March 21, 2017, <https://www.mlive.com/>.

55. Joshua Fechter, “Lawmaker wants to close bigbox retailers’ ‘dark store’ loophole,” *San Antonio Express-News*, June 7, 2017, <https://www.houstonchronicle.com/>.

As in other states, the constitution's uniformity clause also posed a potential barrier to passage.⁵⁶

Wisconsin. Under current state law, rules relating to real estate assessment fall mainly under section 70.32 of the Wisconsin Statutes, which begins as follows:

Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03 (2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale.

During the current legislative session, lawmakers proposed revisions to this section of statutes, among others, with the aim of limiting national retailers' use of dark store theory:

Assembly Bill 386; An Act to create [section] 70.32 (1b) of the statutes. Relating to: property tax assessments based on comparable sales and market segments. See also companion Senate Bill 292.

Assembly Bill 387; An Act to amend [sections] 70.03 (1) and 70.32 (1); and to create [section] 70.32 (1b) of the statutes. Relating to: property tax assessments regarding leased property. See also companion Senate Bill 291.

The bills' authors responded to concerns that dark store theory—if given free reign—would deplete local financial resources. After all, local governments in Wisconsin rely on property taxes for about 36 percent of their revenues, by comparison to an average of 30 percent nationwide.⁵⁷ But both bills failed despite widespread bipartisan support. As in other states, powerful interest groups, including Wisconsin Manufacturers & Commerce, opposed the changes. Retailers like Walmart and Walgreens lobbied against the bills as well.⁵⁸

Less evident but equally important, constitutional provisions may pose problems for legislators seeking to limit dark store theory. The uniformity clause of the Wisconsin Constitution (Article VIII, Section 1) requires uniform taxation of property, and courts have interpreted it as a safeguard “against unequal, and consequently unjust taxation.”⁵⁹ In practical terms, the uniformity clause prevents the legislature from establishing selective rules about taxation and tax assessment. For example, legislators cannot vote to tax

56. See Tex. Const. art. VIII, § 1, <https://statutes.capitol.texas.gov/>.

57. Lincoln Institute of Land Policy, “State-by-State Property Tax at a Glance,” *Significant Features of the Property Tax*, accessed July 25, 2018, <http://datatoolkits.lincolnst.edu/>; Wisconsin Legislative Fiscal Bureau, “Property Tax Level in Wisconsin,” (January 2017), 1, <http://docs.legis.wisconsin.gov/>.

58. Mark Sommerhauser, “Compromise on how to tax large retailers falls apart in wee hours of Assembly finale,” *Wisconsin State Journal*, February 24, 2018, <https://madison.com/>. See also Wisconsin Ethics Commission reporting on the bill, accessed July 27, 2018, <https://lobbying.wi.gov/>.

59. *Wisconsin Central Railroad Co. v. Taylor County*, 52 Wis. 37, 62, 8 N.W. 833, 839 (1881), quoted in Kreye, “The Uniformity Clause,” 1.

commercial property at twice the rate of residential property. Constitutional amendments have carved out some exceptions, like one for agricultural and undeveloped lands.⁶⁰ (Although farmland crisscrosses the state, it accounts for a disproportionately small share of property tax revenues—less than 1 percent of real property values, according to the Lincoln Institute—because of differing tax rates and assessments.)⁶¹

Conclusion

Ultimately, legislators may be hard-pressed to enact legislation that taxes big box retailers differently than other property owners, lest those laws contradict the constitution. Instead, “the legislature will most likely have to work *around* the uniformity clause,” crafting bills that address the issue without creating separate classes of taxpayers.⁶² Before the 2019 session even begins, residents of Washington County, for example, will vote on the following referendum:

Should the state legislature enact proposed legislation that closes the Dark Store loopholes, which currently allow commercial retail properties to significantly reduce the assessed valuation and property tax of such properties, resulting in a substantial shift in taxes levied against other tax paying entities, such as residential home owners, and/or cuts in essential services provided by an affected municipality?⁶³

If they answer in the affirmative on November 6, voters may heighten pressure on policy makers to resolve this issue come January 2019.⁶⁴ ■

60. Although the clause prohibits partial exemptions, it does enable complete exemptions to property taxes, like land used for public parks or camps for persons with disabilities. One 1974 constitutional amendment allowed nonuniform taxation of agricultural and undeveloped land. Kreye, “The Uniformity Clause,” 5–7; Jack Stark, “The Uniformity Clause of the Wisconsin Constitution,” 76 Marq. L. Rev 577 (1993).

61. Lincoln Institute of Land Policy, “State-by-State Property Tax at a Glance.” See also Wis. Stat. § 70.32 (4) (2017), <https://docs.legis.wisconsin.gov/>. See also Emma Drilias, “Equalized Values and Net Property Tax by Type of Taxpayer,” Legislative Fiscal Bureau, August 30, 2018, <https://docs.legis.wisconsin.gov/>. See also Wisconsin Department of Revenue, “Equalized Value,” accessed September 11, 2018, <https://www.revenue.wi.gov/>.

62. Kreye, “The Uniformity Clause,” 7; Stark, “The Uniformity Clause of the Wisconsin Constitution,” 622.

63. Washington County, “Washington County Board Approves ‘Dark Store’ Referendum,” News and Hot Topics, accessed September 11, 2018, <http://www.co.washington.wi.us/>.

64. For more information about these referenda, see Doug Schneider, “Brown, Outagamie County leaders say state must close ‘dark stores’ loophole,” *Green Bay Press Gazette*, April 13, 2018, <https://www.greenbaypressgazette.com/>.