

## BODEN LECTURE

# INTERNATIONAL HUMAN RIGHTS LAW: An Unexpected Threat to Peace

By Ingrid Wuerth

It is a great honor to deliver this lecture in honor of the late Dean Robert F. Boden. I am grateful to all of you for attending. My topic tonight is international law and peace among nations. It may seem a poor fit for a lecture honoring Dean Boden. I did not know him, but I have read that Dean Boden was passionately dedicated to teaching law students about the actual day-to-day practice of law. He believed that law schools should be focused on that sort of professional training—not on policy questions or preparing students to be “architects of society,” as one of his successors characterized his views.

International law involves lots of policy. And some international law involves structuring or building a global society of sorts. Yet it also demands outstanding technical lawyers—the very ones that we train, you at Marquette and I at Vanderbilt. Beyond that, international law addresses many topics about which lawyers and other leaders in Milwaukee and Nashville should be educated, even passionate. Those include my topic tonight. So I think that Dean Boden would approve.

In all events, the importance of peace among nations is clear as we look back in history to the devastating losses of World Wars I and II and as we

look forward and contemplate the possibility of nuclear conflict with Iran or North Korea, or the possibility of a maritime war with China, or war with Russia in Ukraine and Eastern Europe. Many foreign policy experts size up the world today and conclude that the risk of a major interstate war is significant and growing.

One threat comes from what has been termed “Thucydides’s Trap,” named after the ancient Greek historian of the Peloponnesian War. Thucydides argued that the rise of Athens and the fear this instilled in Sparta, the dominant power of the time, made war inevitable. And it has not been just Sparta and Athens. Looking over the past 500 years, scholar Graham Allison has argued that when a power rises quickly and threatens to displace a ruling power, the most likely outcome historically is war. The key variable is a rapid shift in the balance of power, generally



**Ingrid Wuerth**, who holds the Helen Strong Curry Chair in International Law at Vanderbilt University, delivered Marquette Law School’s annual Robert F. Boden Lecture this past fall. This is an edited version of Professor Wuerth’s lecture, which also appears (with notes) in the spring issue of the *Marquette Law Review*.

measured by relative gross domestic product and military strength. Twelve of the 16 cases in which this occurred in the past 500 years ended violently.

Today, this threat is posed by China, whose dramatic economic growth threatens to displace the dominant power: the United States. Indeed, on some economic measures, it has already done so. China is also making tremendous investments in its military, narrowing the gap between itself and the United States. History suggests that this pattern is a dangerous one.

Beyond the specifics of Thucydides's Trap, both China and Russia are revisionist powers—meaning that they are unhappy with the global distribution of power and would like to restore regional dominance. Robert Kagan, of the Brookings Institution and formerly of the State Department, warns that we might be “[b]lack[ing] into World War III.” Some of the Chinese and Russian ambition is territorial—as in the East and South China Seas for the former and in Ukraine and Eastern Europe for the latter. China and Russia both view themselves as victims of hegemonic power wielded by the West, in particular by legal power exercised through international law, sometimes in the form of unfair treaties—or, to use the term made popular in the Ottoman Empire, “capitulations.”

Both China and Russia perceive the liberal post-war order in general, and the United States in particular, as thwarting their objectives. At the same time, Kagan argues, the United States and the West have a declining will and ability to maintain the dominant place that they have held in the international system since 1945.

Other foreign policy experts argue that, despite their differences, American liberals and conservatives shared three basic foreign policy principles in the post-World War II era: faith in democracy; belief that America's security is enhanced by its broad and deep alliances around the world; and confidence that open trade brings global prosperity. A retreat from these post-World War II values means that the risk of war grows, some have warned.

But there is some good news: Despite these threats and even gathering storm clouds, today we continue to live in a period dubbed “The Long Peace”—meaning the post-World War II period in which there has been a dramatic reduction in armed conflict between nation-states, especially among great powers.

During that same period—indeed, extending further back to the end of World War I—a central, overarching goal of international law has been the eradication of interstate war. The place or the role of international law in creating and sustaining the Long Peace is neither straightforward nor uncontested, but there are strong reasons to think that international law has helped generate that peace. Unfortunately, the features of international law most likely to have contributed to peace are today under threat, in part from unexpected quarters.

Here I wish briefly to describe the international law designed to limit interstate armed conflict. Then I will offer an evaluation of whether and how international law has been successful at preventing interstate armed conflict. My last (and longest) topic addresses current threats to peace that come from changes in international law.

### **Prohibition on the Use of Force and the United Nations Charter**

Following the devastation of World War I, the Covenant of the League of Nations sought to prevent war by requiring member states to use a compulsory system of dispute resolution. But the covenant did not prohibit war outright. In fact, war was still permitted as a method of interstate dispute resolution, just as it had been for centuries.

The Kellogg–Briand Pact of 1928 changed this. With this pact, or treaty, countries pledged that the “solution of all disputes” which might arise between them “shall never be sought except by pacific means.” That pact, which came about in large part because of the efforts of a visionary corporate lawyer from

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the Midwest named Salmon Levinson, was not an immediate success. Indeed, just a decade later, World War II began. And it was started by the very countries that had signed the Kellogg–Briand Pact.

So much for international law—for a while. As World War II raged, U.S. lawyers and diplomats worked again to end war for all time, now by drafting what would become the Charter of the United Nations.

The United Nations Charter has as its centerpiece a prohibition on the use of force: Article 2(4), which forbids the “threat or use of force against the territorial integrity or political independence of any state.” The charter makes exceptions for self-defense and for uses of force authorized by the United Nations Security Council. The Security Council has the power to enforce the prohibition on the use of force through coercive measures, but the victors of World War II have the power to veto any such measures. Those countries are China, France, Russia, the United Kingdom, and the United States. Unlike the failed League of Nations, the United Nations has near-universal membership.

Today the United Nations has an enormous agenda of worthy causes, from protecting human rights to combating diseases such as AIDS. It is easy to forget that at its inception, its core purpose was to prevent war. Those drafting the charter rejected, for example, language that would have made human rights obligations legally binding.

## Has It Worked?

So now for the second matter: Has it worked? As I have already said, we are today in a period that has been dubbed the Long Peace, meaning the post-World War II period in which there has been a dramatic reduction in armed conflict between nation-states, particularly in conflicts involving the world’s great powers. But the precise role of *international law* in reducing interstate armed conflict is not clear. To begin with, there are questions about how international law is enforced—why, in other words, would it be effective? We will return to that point. Also, factors other than international law have unquestionably contributed to peace among nations; these likely include economic integration and development, the advent of nuclear weapons, and changing norms of human behavior.

We do know that during this long peaceful period, territorial *conquests*, now outlawed by international law, have been curtailed. One recent study, a book by Oona Hathaway and Scott Shapiro, argues that in the years before World War II, an average state could expect one conquest in a human life span. Since World War II, an average state can expect some kind of territorial conquest once or twice a millennium. The period between 1928, when the Kellogg–Briand Pact took effect, and the end of World War II obviously involved lots of territorial conquests, suggesting that international law did not work.

## The empirical data make two things clear: (1) War is most likely to occur when countries have disagreements about territory, and (2) war is least likely to occur between democracies.

In the end, however, most of those conquests were reversed. Why? The same study argues that the acquisition of territory by force violated international law after 1928, so that those conquests were not recognized by other nations and were eventually reversed, a pattern we do not see before 1928. Note that if Hathaway and Shapiro are correct, a Midwestern corporate lawyer trained in law at Lake Forest College had the vision and determination to push through a treaty that had a transformative effect on world affairs.

Some are skeptical about the importance of 1928 and the Kellogg–Briand Pact, however, especially in light of the devastation of World War II that followed. It is clear that some forms of territorial conquests have declined since the late 1940s when the U.N. Charter came into effect, with its prohibition on the use of force. But, as I have said, factors other than international law may have worked to generate peace among nations. Various empirical studies do show a relationship between international law and some aspects of territorial disputes, although proving causation is, again, difficult.

Let us approach the question from a different angle. Putting aside international law for a moment, what do we know about the causes of war? The empirical data make two things clear: (1) War is most likely to occur when countries have disagreements about territory, and (2) war is least likely to occur between democracies. These two findings are called the “territorial peace” and the “democratic peace,” respectively. I will focus on the former.

The territorial-peace literature tells us that if international law reduces conflict over territory, it should improve the likelihood of peace among nations. Indeed, reducing conflict over territory appears more likely to prevent armed conflict than does reducing economic or political conflict. This is an important finding: It means that to the extent international law is designed to limit territorial conflict, it is aiming at the correct target in terms of securing peace. And, as we have partly seen, international law

has put in place a variety of mechanisms to reduce conflict over territory, including not just Article 2(4) of the U.N. Charter and the ban on conquests but also a host of treaties and doctrinal rules designed to preserve the sanctity of borders and institutions tasked with reducing conflict over them.

If these legal rules and institutions make territorial conflict more costly to states—which they unquestionably do, even if we do not know *how* costly—then at a minimum they reduce the incentives to engage in conflict over territory. This, in turn, is strongly correlated with peace. To be clear, this reasoning does not prove that international law has generated the Long Peace. Rather, it says that territorial conflict is strongly associated with military disputes; that international law is designed to reduce conflict over territory; and that, as those international norms generally solidified, some forms of territorial conflicts have in fact declined.

Against that backdrop, let’s turn now to our central topic: contemporary threats.

### Contemporary Threats

Although the data we have strongly suggest that the international legal system has contributed to the prevention of some kinds of armed conflict, today peace among nations is under threat from both geopolitical and legal forces. We have already discussed the geopolitical threats.

What of the threats that come from changes in the international legal system? Here you may expect me to explain how President Donald J. Trump has undermined international law. In fact, I don’t think he has (yet at least), with one exception. My target is elsewhere, somewhere you are probably not expecting: human rights.

The post-World War II international legal order has been characterized by the Long Peace, but also by the rise of international human rights law, especially since the 1970s. Human rights have purported to transform international law, in part by changing the definition of “state sovereignty” to mean not merely effective

control over territory but also the use of state power to protect and promote individual human rights.

The idea is powerful: States are not fully sovereign when they are violating human rights. Powerful, but with potentially deleterious effects for other international legal norms.

### **Relaxing International Law's Prohibition on the Use of Force**

The transformation of state sovereignty to include respect for human rights led to an explicit call for the use of external force to prevent widespread human rights violations, sometimes called “humanitarian intervention” or (with slightly different content) the “responsibility to protect” (R2P).

The doctrine rose to prominence during and after the 1999 NATO bombing of Kosovo ordered by President Bill Clinton. The bombing was for humanitarian purposes—not, the United States said, for territorial conquest. The action violated Article 2(4) of the U.N. Charter but was defended by a few countries and by many individuals as legal on the ground that it served to protect and promote the human rights of Kosovar Albanians.

The U.N. Security Council was unable to act because Russia, with its permanent member's veto, was a longtime ally of Serbia, in which Kosovo was located. China and Russia argued that the unrest in Kosovo was a domestic issue, not one justifying international intervention. These events led to an extensive debate about the wisdom and the legality of humanitarian intervention lacking either U.N. Security Council approval or the consent of the territorial state. Russia vehemently protested the NATO action, characterizing it as “a gross violation of the United Nations Charter and other basic norms of international law”—one illustrating that “[t]he virus of lawlessness is spreading to ever more spheres of international relations” and undermining the “capacity of the Security Council to defend the United Nations Charter.” China condemned NATO's intervention for exactly the same reasons.

The Kosovo intervention, however well-intentioned (and remember, from Russia's perspective, it was not well-intentioned), has had destabilizing ramifications. The bombing campaign led eventually to Kosovo's declaration of independence from Serbia in 2008. Not surprisingly, Serbia and its allies, especially Russia, condemned the declaration of independence and do not recognize Kosovo as a nation-state, even today, meaning that Kosovo will not become a member of the United Nations any time soon.

### **Georgia and Crimea**

Kosovo set a precedent for bypassing the U.N. Security Council and Article 2(4) of the U.N. Charter by one purportedly acting for humanitarian purposes. Despite its vehement disagreement with the Kosovo action, Russia eventually welcomed that precedent—citing it to justify Russia's use of force in both Georgia and Ukraine. Crimea, which was once part of Ukraine, is today Russian.

Official Russian explanations for the actions against Georgia and Ukraine made clear references to precedent set by NATO in Kosovo. Russia said, in each case, that it was acting to protect a Russian minority from human rights violations at the hands of the Georgian or Ukrainian government. Note that many people in Russia and even in the West did not condemn this analogy. Although sanctions have been imposed on Russia in response to the annexation of Crimea, popular support for Putin's handling of the situation in Ukraine remains very high among Russians. To domestic audiences, Putin emphasized that Western countries' interventions in Kosovo and in Libya in 2011 were conducted under “the false pretense of a humanitarian intervention.” His emphasis on the international legal basis for Russian actions in Ukraine shows his belief that the action would be more popular at home, and therefore less costly to his government and to Russia's interests, if it were viewed as consistent with international legal norms.

Today, the primary threat to peace with Russia is the increasingly militarized borders between NATO (or NATO-allied) countries and Russia—the area where thousands of NATO troops, the most since the end of the Cold War, are stationed.

In the context of Georgia and Ukraine, humanitarian intervention has thus helped generate conflict over territory by reducing the costs of intervention that can be termed “humanitarian.” And the literature about the territorial peace tells us that territorial disputes have historically been most likely to lead to militarized conflict.

### **Syria**

President Trump's airstrikes in Syria have further contributed to the erosion of Article 2(4) of the U.N. Charter. You will recall that in April 2017, acting without U.N. Security Council authorization, President Trump ordered airstrikes in response to Syria's use of chemical weapons—a deplorable and horrific act by Syria, to be sure. Unlike the bombing of Kosovo, the Syrian airstrikes were not the effort of a regional

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security organization such as NATO. They were not multilateral but unilateral.

Supporters of President Trump's actions from across the political spectrum—and there were many—defended the strikes as consistent with international law, arguing that Article 2(4) of the charter needs to be updated. We need, according to this view, a more nuanced approach to the use of force under international law, one that is carefully calibrated to permit the use of force in response to humanitarian atrocities.

But we must be clear about the risks. Perhaps the degradation of the U.N. Charter-based limitations will weaken the international law prohibitions on the use of force, making regional or global conflict with China, North Korea, and Russia more likely. Today, the South China Sea is often cited as the world's leading conflict-prone area. And a border dispute between China and India continues to simmer.

China, in turn, was unusually and in fact alarmingly restrained in its comments about the Syrian airstrikes. Breaking from past practice, China did not directly criticize U.S. airstrikes in Syria as violating international law. Why not? Perhaps China's territorial ambitions in the South China Sea mean that it has begun to see Article 2(4) as hindering its foreign-policy objectives.

Many in the West assume that we—meaning the West—can set the rules for the appropriate departures from Article 2(4). Russia has made clear in Eastern Europe that it will use those departures to its own ends. China may be next.

Recall that the theoretical basis for these actions is the transformation of sovereignty to include protection for human rights. China and Russia view that purported transformation as an illegitimate effort to deny them the full benefits of sovereignty—to change the rules of the game, if you will, to remake sovereignty in a way that favors Western political order.

Now for the second threat.

### Sidelining and Weakening the U.N. Security Council

The use of force in Syria, Ukraine, and Kosovo, all in the name of human rights and humanitarian ambitions, also served to undermine the authority of the United Nations Security Council, as I have already mentioned, and as China and Russia have lamented.

Note, however, that the Security Council is a key forum for resolving other threats to interstate peace, such as Iran and North Korea. China, which is key to containing North Korea, highlights its constructive role in developing the U.N. Security Council resolutions designed to deter North Korean nuclear and missile programs. After all, it is international law that provides the basis for imposing sanctions on North Korea to limit its nuclear ambitions in the first place. The United States returns to the Security Council when it wants to impose sanctions against North Korea. Undermining the U.N. Charter and weakening the U.N. Security Council in the context of human rights make it more difficult to achieve these other objectives.

In the case of Iran, too, the U.N. Security Council is important to realizing U.S. goals, and international law as a whole supports the U.S. policy objectives of preventing the acquisition of nuclear weapons by Iran. Sanctions imposed by the U.N. Security Council led to the 2015 Joint Comprehensive Plan of Action, which relaxed sanctions in return for Iranian concessions on its nuclear program. Undermining the U.N. Security Council makes peace more difficult to achieve in this context as well.

The human-rights-based doctrine of humanitarian intervention allows states to sideline the U.N. Security Council, as we have seen. But there are other ways that human rights may have had deleterious effects on the U.N. Security Council. The Security Council's mandate has grown over the years to include more and more matters related to human rights. With that growth come two problems: heightened expectations that go unfulfilled ("credibility costs") and greater perceptions of selectivity and bias ("polarization costs").

Let me focus on one example: Libya.

In the case of the 2011 airstrikes in Libya, the U.N. Security Council authorized the use of force to protect civilians from the threat of massive human rights violations. Russia and China abstained from (but did not veto) the relevant Security Council resolution.

Air strikes in Libya were ultimately used by NATO to help the Libyan rebels oust Qaddafi—again, in the name of human rights. The regime-change aspect of the intervention appeared to many countries to be the use of human rights and humanitarian issues as a smokescreen for the removal of Qaddafi, a result explicitly desired by the West. As one writer put it, the use of force in Libya “fueled speculations as to which other countries are also likely candidates for intervention” by Western countries.

Cooperation between Russia and Western countries on other issues became more difficult. Consider this alarming example: When Russia effectively annexed Crimea, many nations in the United Nations General Assembly refused to condemn this obvious violation of international law. Why? They saw it as justified payback for the West’s selective enforcement of human rights law in Kosovo and even in Iraq—a war also justified in part based on human rights. This kind of response is consistent with the work of behavioral law and economics scholars who argue that states will be less willing to enforce international law if they perceive it as biased and unfair. Beyond just Libya, human rights norms cover so many topics and are so

widely unenforced that perceptions of bias abound.

The U.N.’s actions with respect to Libya also led to credibility costs. Note that at the same time as the intervention in Libya moved forward, the Syrian government was using increasingly violent measures to quell domestic unrest. The Syrian conflict escalated into a civil war, killing hundreds of thousands of people. But the Security Council was unable to take meaningful action. The expanded mandate of the Security Council over mass atrocities and other human rights violations creates a credibility problem when the council is hamstrung by political differences and, accordingly, cannot act in response to massive atrocities in violation of human rights law.

Let’s turn to the third threat.

### **Human Rights: Making International Law Weaker?**

The problems that human rights have created for the U.N. Security Council are mirrored by problems that human rights have created for international law as a whole. First, international human rights law has expanded the core of international law itself, just as it has expanded the mandate of the U.N. Security Council.

The two primary sources of international legal obligations—treaties and custom—have become broader over the past several decades, so that more and more human rights are protected by binding international law. The success of the effort is clear in one way: International law now regulates a vast array of human-rights-related conduct. Today there



are 64 human-rights-related treaties, just counting those under the auspices of the United Nations and the Council of Europe; those agreements have 1,377 human rights provisions.

Not only are there lots of obligations, but they are often violated. One set of commentators sympathetic to international human rights law has quipped: “If human rights were a currency, its value would be in free fall.” This may or may not be good for human rights, but the point I would like to make is a different one: It involves this expansion’s potential effect on international law *as a whole*.

Widespread violations of some legal norms may make it harder to enforce others. As an analogy, consider the “broken windows” theory of crime prevention, which posits that widespread violations of law, even mundane and apparently trivial legal rules, lead to other, potentially more-serious violations of law. Similarly, widespread violations of human rights law may signal that no one cares about violations of international law as a whole. Accountability is a fundamental concern of public international law because the system lacks a centralized enforcement mechanism.

Whatever the “broken windows” argument suggests about policing, behavior that signals a lack of accountability may be especially damaging to international law writ large. As Michael Glennon writes, “The effect of inefficacy is contagion: The entire legal system is discredited when prominent rules are flagrantly violated.” It is not just that human rights law goes unenforced; enforcement is also inconsistent, leading to perceptions of bias and unfairness, which may, as I mentioned before, make countries less inclined to enforce or follow international law as a whole.

That points us back to one of the topics I raised at the beginning of the lecture: How can international law quell territorial conflict when international law lacks a centralized enforcement mechanism?

International law works by making violations costly in some way for the violator. Those costs can be in the form of sanctions imposed by other countries; internalizations of the norm, which make the potential violator unwilling to act counter to it; disapproval from the domestic constituencies within the violating country; the withholding of benefits by other countries; or even actions by the United Nations Security Council, as when Iraq invaded Kuwait. But Security Council enforcement measures can be vetoed by any one of the five permanent members, making these measures of limited effectiveness. More important, generally, are the enforcement measures taken by individual states and the concern by *potential* lawbreakers that violating international law will lead to some kinds of costs. Two things are key to this system of compliance: reputations of states for compliance and reputations of states for punishing violators.

The point about human rights is this: States’ *reputations* for compliance and for enforcing international law decrease as a whole when there are a large number of unenforced international legal obligations.

Finally, let us return to the other topic I raised at the beginning of the lecture. Recall my saying that democracies rarely go to war with each other. If international law tends to make states more democratic, then it would appear to contribute to peace among nations, at least based on what we know about the conditions under which war was likely in the past. This observation suggests that in order to secure peace among nations, international law should pursue human rights, because human rights protections are associated with democracies.

But “human rights” have only a weak relationship to “democracy” as defined in the political science literature. It turns out that “democracy” as measured by the democratic-peace literature is not the same as a human-rights-respecting regime. The term *democracy*

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has three components: the ability of citizens to express effective policy preferences, institutional constraints on executive power, and civil liberties. But the empirical studies showing the “democratic peace” do not measure civil liberties at all—so the vast majority of these 1,377 international legal protections for human rights are not necessarily associated with the democratic peace.

There is, however, an additional problem with the claim that international human rights law has helped create the democratic peace. Even if *human rights* are correlated with peace between some pairs of states, the extent to which *international human rights law* generated or sustained those human rights is especially difficult to assess.

The protection of human rights is provided for in an overlapping set of domestic statutory and constitutional law around the world, as well as through binding and nonbinding international legal instruments and regional human rights instruments. The same is not true of international law that limits conflicts over territory. The cornerstone of that system—indeed, the cornerstone of post-World War II international law—is the prohibition on the use of force against the territorial integrity of another state. This is not an issue meaningfully regulated by domestic or soft international law.

That human rights are protected by many domestic and regional legal instruments means that it may be possible to safeguard human rights without using binding international law to do so. In other words, we can view the human rights movement as tremendously successful at embedding human rights into so many legal frameworks, even if we conclude that binding international law should today be used largely to serve other purposes. Some recent work on human-rights outcomes emphasizes the importance of iterative engagement with international bodies as well as the importance of domestic political conditions to securing human rights. Note that neither of these conditions necessarily requires binding international legal norms to be successful.

## Conclusion

Even as the world faces global financial uncertainty, cyber-insecurity, terrorism, climate change, growing authoritarianism, and other risks, peace among nations remains of fundamental importance. Indeed, threats to peace—to say nothing of war itself—hinder our capacity to cooperate and make progress on all these other global issues.

How to ensure peace among nations? Based on what we know about the causes of war, it is likely that international law has contributed to what we call the Long Peace by outlawing territorial conquests and putting in place other rules that preserve territorial integrity and reduce conflict over borders. Today, peace among nations is under threat from the rise of China, an emboldened Russia, and the weakening of Western institutions and alliances.

But it is also under threat from an unexpected source: the rise of international human rights law. Human rights law has sought to transform sovereignty, to make state sovereignty conditional upon fulfilling states’ obligations to their own people. That objective is laudable, of course, but it comes at a price. Weakening the territorial-based system of state sovereignty unsurprisingly generates territorial uncertainty. States are less secure in their borders if human rights can serve as the legal basis for armed attacks, regime change, or providing support to separatist movements within another country’s territory.

Human rights also tear at the system of international law as a whole. By declaring a vast array of human rights to be protected through international law, the hope over the past several decades was to harness the power of law, the power of legal obligation to ensure that individual human rights are protected. Again, a laudable goal.

But international law is not a strong system of law; it depends upon decentralized enforcement, it depends upon reputations for compliance, and it depends upon the United Nations and the Security Council. These are not unlimited resources.

Human rights tear at the fabric of international law by designating as “law” many, many obligations that are not enforced and that states are not serious about enforcing—cheapening the currency of international law itself. They tear at the fabric because the enforcement of international human rights law is selective and political, leading to polarization and credibility costs. What is the overall impact on peace among nations? That’s hard to measure.

But if international law is part of what has generated the Long Peace, making international law weaker and less effective is a step away from peace, not toward peace.

To create the conditions for peace among nations, international law should refocus on a core set of legal obligations designed to facilitate international cooperation and promote international peace and security. ■

# MIGRATION CHALLENGES

## Trends in People's Movement to and from the Milwaukee Area and Wisconsin Illuminate Important Issues

By John D. Johnson and Charles Franklin

Marquette Law School launched the **Lubar Center for Public Policy Research and Civic Education** in 2017. Part of the Lubar Center's work is the **Milwaukee Area Project**, which aims to increase understanding of trends and forces shaping the Milwaukee region (in particular, the five-county area of Racine, Milwaukee, Waukesha, Ozaukee, and Washington). In this piece, John D. Johnson, the Lubar Center's research fellow, and Charles Franklin, the Law School's professor of law and public policy, use census data to examine population growth in the Milwaukee area and across Wisconsin.

While debates about immigration nationwide focus on the in-flow of people from other nations, immigration and emigration of a different kind also continue to have important effects on the United States. People relocating from one place to another within the country shape the social and economic life of the places they leave and the places to which they move.

Wisconsin as a whole has been a slow-growth state in terms of population. But some areas are doing better than others when it comes to attracting people. The five-county Milwaukee area (made up of Racine, Milwaukee, Waukesha, Ozaukee, and Washington counties) may provide a good window: The area's growth has been slow in recent times, which has implications for the future of jobs and businesses in the region.

Consider that as the state develops new economic centers—such as the anticipated Foxconn complex for making liquid crystal display equipment in Racine County, the distribution center for Amazon in Kenosha County, and the fast-growing Epic electronic medical records technology business in suburban Madison—the hope for economic growth rests in part on the availability of a labor force sufficient to meet the needs of employers. With a state unemployment rate of about 3 percent, and a relatively high workforce-participation rate, it is a challenge to expand the labor force.

Thus, if natural population growth is likely to remain at low levels, given long-term declines in the birth rate, the state must rely on attracting new residents to expand its workforce and economy or face a shrinking human-resource pool.

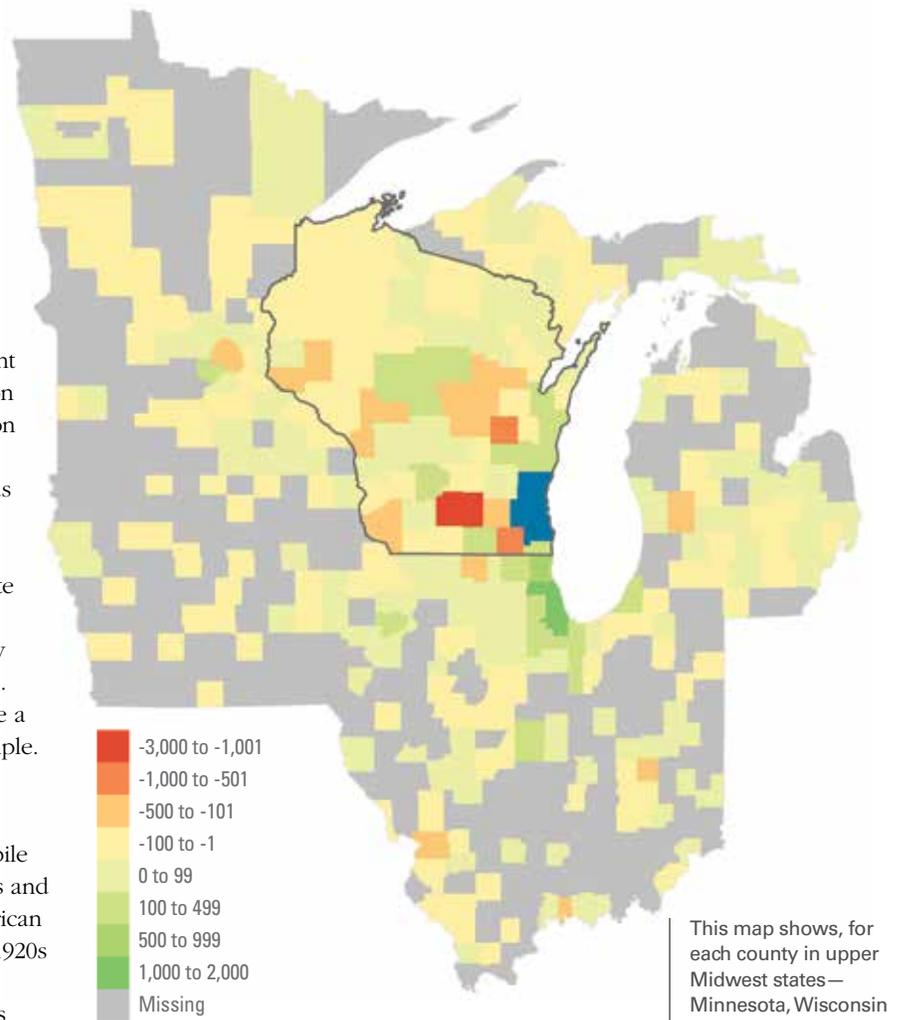
Detailed analysis of U.S. Census data sheds useful light on trends in the population flow. This analysis offers some highlights of what can be seen in those data. The focus here is on the overall numbers associated with the movement of people and not on racial, ethnic, or socioeconomic aspects of movement trends. Likewise, international immigration is an important (though much smaller) piece of the total migration puzzle. These other important aspects of migration will receive attention from the Milwaukee Area Project in subsequent analyses. Most of the census data used here are adapted from the 2011–2015 American Community Survey (ACS), a project of the U.S. Census Bureau. This provides an estimate of population flows and characteristics at small geographic levels based on a large pool of survey responses conducted over the previous five years. As with all surveys, statistics from the ACS include a margin of error dependent on the size of the sample.

### Some Historical Context

The United States was once an extremely mobile population, with westward migration in the 1800s and during the Depression, the Great Migration of African Americans from the south to the north from the 1920s through the 1960s, and the explosion of suburbs in the 1950s and 1960s. That idea of Americans as extraordinarily mobile has largely become a modern myth as geographic mobility has declined in each decade since the 1980s.

To give a sense of it: In the post-war period from 1948 through 1970, an average of 19.9 percent of residents in the United States annually changed their home address. To be more specific, 3.2 percent moved to a different county in the same state; slightly more, 3.3 percent, moved to a new state; and the other 13.4 percent moved but stayed in the same county. During the 1970s and 1980s, geographic mobility began a steady decline nationally, so that from 1990 through 2017, in an average year, only 12.8 percent of the population changed residence, with 4.4 percent changing counties within the same state and only 2.0 percent changing states. Looked at in a different way: In 1970, 13,316,000 people moved to a new county. In 2017, a smaller number, 12,033,000, changed counties, even though the population of the country had increased by 60 percent in the almost half-century in between.

Wisconsin and Milwaukee have their own specific stories. For many decades, Wisconsin was a place with rapidly growing population. In the 1830s and

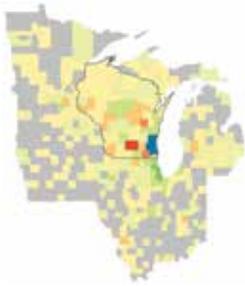


**Net domestic migration per year to (or from) the Milwaukee area for other Midwestern counties**

1840s, lead mining brought a surge of immigrants to the Wisconsin territory. Population increased by a factor of 10 between 1840 and 1850, from 31,000 to 305,000. By 1860, population had more than doubled again, for a total of more than 775,000. Migration from the eastern United States or from overseas at that time, predominantly by German and British immigrants, drove population upward and formed the base for a thriving economy.

Urban centers in the state grew quickly. That was particularly true for Milwaukee. From its founding as three feuding villages (Juneautown, Kilbourntown, and Walker's Point) in the 1830s, Milwaukee developed into a single city by 1846, with a population of 10,000, then as now the largest city in the state. Population boomed for the next century. In 1960, Milwaukee was the 11th-largest city in the United States.

This map shows, for each county in upper Midwest states—Minnesota, Wisconsin (outlined), Michigan, Iowa, Illinois, and Indiana—the net flow of migration between the county and the five-county Milwaukee area (blue), as estimated by the U.S. Census for 2015. For example, the Milwaukee area received a net *gain* of about 1,300 people from Cook County, Ill., and had net gains from most counties in the greater Chicagoland area; shades of the color green are thus used for those Illinois counties. By contrast, the Milwaukee area lost a net of 2,300 people to Dane County, Wis., which is thus depicted in red. Counties in gray had too few migrants to and from the Milwaukee area for reliable estimation. (Data source: 2011–2015 ACS.)



### More-Recent Times

But the natural rate of population growth slowed over the past half century or so, which has made a big difference in demographics and economic vitality, both in Milwaukee and across Wisconsin. Milwaukee is now around 30th place in population in the country. Wisconsin's gradual decline in ranking of states by population had the effect of reducing the number of Wisconsin seats in the U.S. House of Representatives from ten to nine following the 1970 census and then from nine to eight after the 2000 census.

Since the 2010 census, while the U.S. population has grown 5.9 percent, Wisconsin has grown 1.9 percent, ranking the state 40th in the country in growth, one spot behind Alabama, which grew 2.0 percent. In contrast, Minnesota grew 5.1 percent, a rate ranking 21st in the nation, while Illinois lost 0.2 percent, ranking 49th.

Patterns of movements have differed across Wisconsin, with some areas gaining and others losing. For example, booming business in electronic medical records and biotech has given Dane County the highest rate of growth in the state since 2010. Overall, Dane County's population has grown 43,200, or 8.9 percent, since 2010. That accounts for 47 percent of Wisconsin's total population growth. Population in the five-county Milwaukee area has increased by 16,306, or 0.9 percent, since 2010, accounting for 17.8 percent of the state's growth.

### Migration to and from the Milwaukee Area

Let us focus more specifically on the Milwaukee area. In 2015, about 47,000 people moved to the Milwaukee area (recall that this area consists of the five counties of Racine, Milwaukee, Waukesha, Ozaukee, and Washington). Of these people, 18,000 were from another part of the state, and 29,000 were from a different state. In the same year, 54,000 people left the Milwaukee area: 22,000 moved elsewhere in Wisconsin, and 32,000 moved out of the state entirely. Thus, net migration cost the Milwaukee area about 7,000 residents.

Gross migration flows (the sum of inflows and outflows) are a measure of the connection between places. Predictably, a substantial amount of the Milwaukee area's gross migration is with other

places in Wisconsin. As the numbers in the previous paragraph disclose, 40 percent of the five-county area's gross migration is with the rest of Wisconsin.

At the same time, a majority of the Milwaukee area's gross migration involves other states. Of the combined inflows and outflows, 12 percent involve Illinois, and 4 percent involve each of Florida, California, and Texas. Two out-of-state counties make it into the region's top 10 counties by gross migration. The first is Illinois's Cook County—home to Chicago and some 130 other municipalities. Cook County is a net contributor to the Milwaukee area's population. About 3,600 people move from Cook County to the Milwaukee area each year, compared to 2,300 going the other direction. An opposite relationship exists with Phoenix's Maricopa County. Maricopa has the eighth-largest gross-migration relationship with the Milwaukee area, but 63 percent of this exchange consists of people moving *there*, from Wisconsin. And this is not simply a flight of "snowbird" retirees. The Census Bureau estimates that 42 percent of those moving to the Arizona county are 20-somethings. About a quarter are over 54.

The people moving into the Milwaukee area come primarily from within the state and from Illinois: Thirty-nine percent of people arrive from elsewhere in Wisconsin, and 16 percent are from Illinois. California provides 4 percent, and 3 percent are from each of Minnesota, Florida, Michigan, and Texas.

Let's turn our focus to net migration. The Milwaukee area primarily enjoys *net* gains from counties within Wisconsin and from the Chicago region of Illinois. A number of counties to the north, running up to Green Bay and in the Wausau area, are net contributors to the Milwaukee area. By far, the state (besides Wisconsin itself) with the highest net flow of migrants to the region is Illinois, whose surplus of in-migration into the Milwaukee area amounts to nearly 3,000 people annually. Most of this is from northeastern Illinois: While Chicago's Cook County is the largest individual source, each of the five suburban counties surrounding Cook County sends more people to the Milwaukee area than that county receives. The net flow from Cook County is around 1,300 people, but the flow from the surrounding counties is 1,400. North Carolina

**Since the 2010 census, while the U.S. population has grown 5.9 percent, Wisconsin has grown 1.9 percent. . . .**

and Iowa are distant runners-up, with the Milwaukee area gaining a net of 400 from North Carolina and 200 from Iowa.

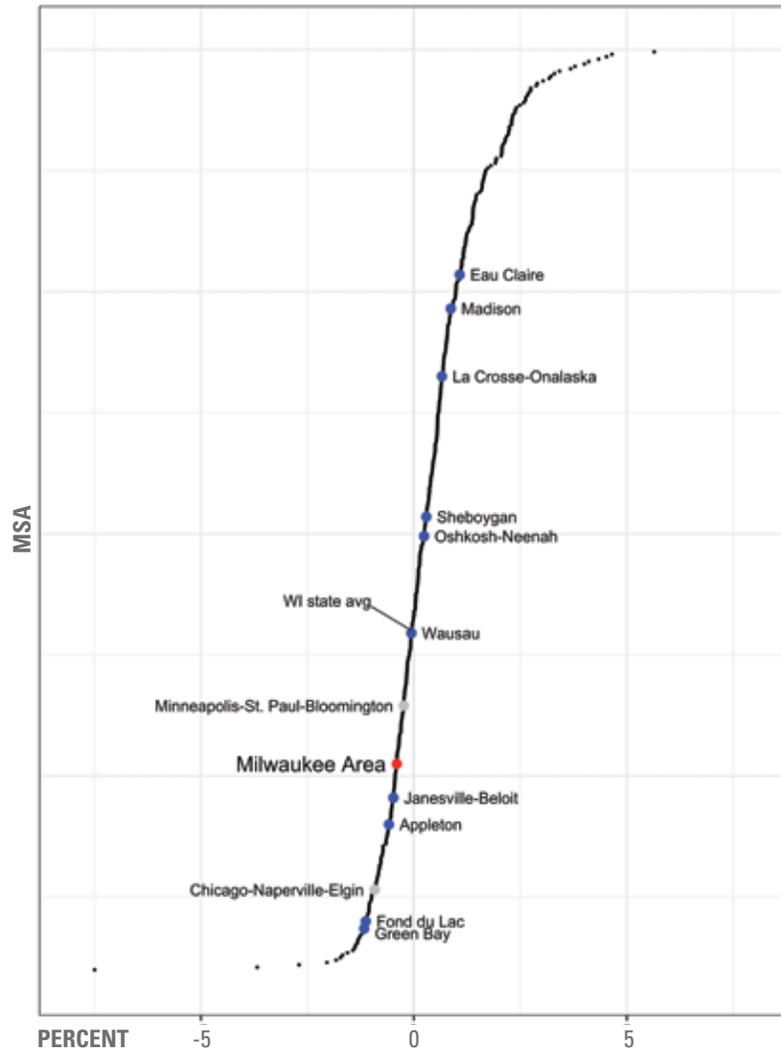
The Milwaukee area's greatest net loss from migration is to Dane County. About 4,500 people move to Dane from one of the five Milwaukee-area counties each year, while 2,200 move the other way. This net loss of 2,300 residents is nearly three times greater than the region's next-largest losses, which involve Winnebago and Walworth counties.

## Metropolitan Area Migration Patterns

To attract migrants, the Milwaukee area competes with other metropolitan areas nationally and in Wisconsin. For the most part, the competition is difficult.

We compare the performance of the five-county Milwaukee area to each of the country's other census-designated metropolitan statistical areas (at the time in question there were 379 other "MSAs") by calculating net domestic migration (newcomers minus leavers) for each one and dividing this number by the MSA's total population. The Milwaukee area is divided into two MSAs by the census, but we combine them into a single measure for this analysis.

The Milwaukee area lags both the state and the national averages of all MSAs in net migration, losing about 0.4 percent of its population annually. By this measure, the region still performs better than the MSAs of Green Bay, Fond du Lac, Appleton, and Janesville-Beloit, but it performs worse than the state's six other MSAs. Of these, the MSAs of Madison and Eau Claire perform the best, growing by 0.8 percent and 1.1 percent respectively as a result of net migration. La Crosse-Onalaska, Sheboygan, and Oshkosh-Neenah posted more-modest gains, while Wausau nearly broke even. Nationally, the Milwaukee area ranked 295th among metropolitan statistical areas.



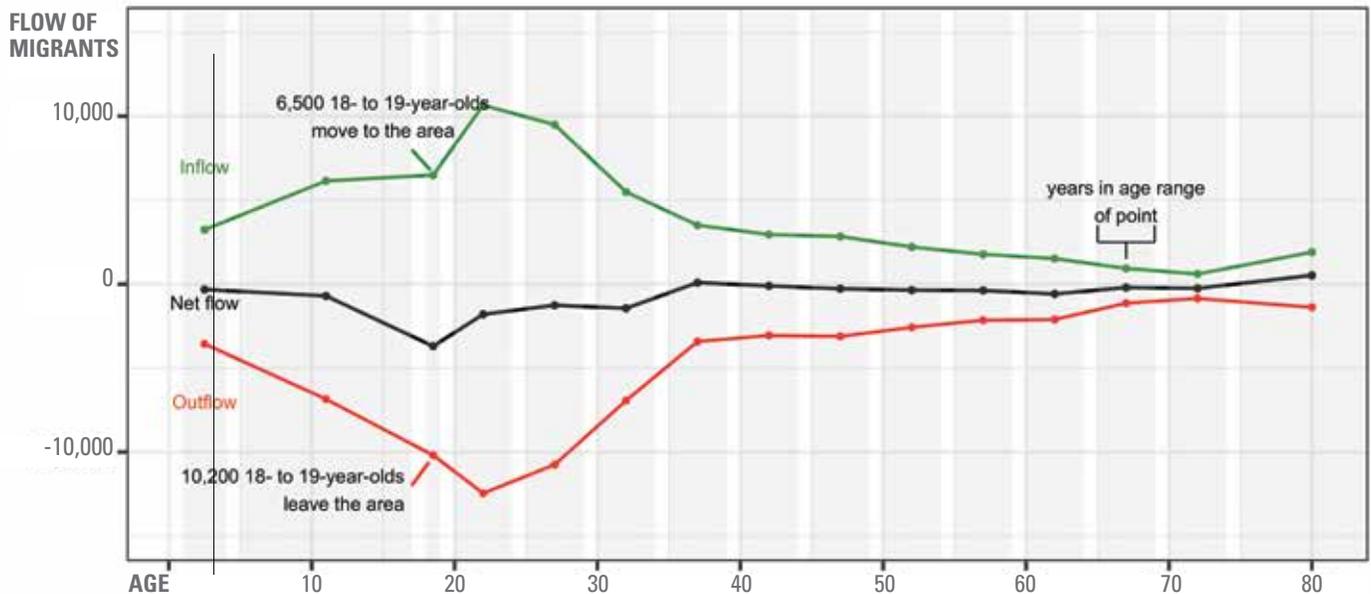
**Net domestic migration as a percentage of total population**

All U.S. Metropolitan Statistical Areas

When the measurement is as a percentage of a local area's population, areas such as Eau Claire, Madison, and La Crosse-Onalaska are among the bigger gainers from the movement of people in and out, while Racine and the Milwaukee-Waukesha-West Allis Metropolitan Statistical Areas (combined here as "Milwaukee Area") have more people moving out than in, putting them much lower in national rankings. (Data source: 2011-2015 ACS.)

Migration patterns within the state disproportionately favor counties outside the Milwaukee area, with Winnebago, Portage, Eau Claire, and Dunn counties enjoying more than their share of in-state movers. Milwaukee County trails proportionately as a destination for migrating Wisconsin residents who move from one county to another. Racine and Washington counties also receive fewer intrastate migrants than their populations would suggest, while Ozaukee and Waukesha attract slightly more.

The situation changes when migrants from other states are considered. Sixteen percent of the people who move from out of state come to Milwaukee



**Inflow, outflow, and net domestic migration by age, five-county Milwaukee area**

The net outflow of 18- to 19-year-olds from the five-county Milwaukee area is notable. Among people older than that, the trends, as shown in the chart above, are toward less movement both into and out of the Milwaukee area, with the net numbers moving closer to zero (meaning equal numbers of people coming and going). (Data source: 2011–2015 ACS.)

County, just one point less than the county’s share of population. Racine and Waukesha counties perform slightly worse. In all, the five-county area contains about 31 percent of the state’s population and attracts 27 percent of the new residents coming to Wisconsin from out of state. By comparison, Dane County contains 9 percent of Wisconsin’s population, but it attracts 16 percent of interstate migration.

**Age and Geographic Mobility**

The crucial ages for geographic mobility are the late teens and early 20s. These are the years that large numbers of young adults leave home, whether to attend college, to begin working, or for other reasons. In that initial burst of movement (ages 18–19), the Milwaukee area does not fare well. The region draws in about 6,500 people per year in this age group, but it loses 10,200, for a net loss of 3,700. The region improves among those 20 to 29, but still loses (net) in the neighborhood of 3,000. For those 30 to 34, there is a net loss of some 1,400. After these volatile years, the Milwaukee area’s migration trends stabilize at a net loss of a few hundred people per year across each older age group (aside from a slight population gain among those 75 and older).

In other words, the crucial part of the area’s population loss to migration comes among people from 18 into their early 30s. These statistics are for the entire five-county region. Inflows and outflows

of migrants by age vary dramatically from county to county within the region because some communities are higher-education hubs while others are not. Likewise, some areas are more congenial to young professionals, while others are more popular with people establishing families.

Consider the area’s two largest counties, Milwaukee and Waukesha. Milwaukee County is home to more than a half dozen universities and colleges, and this is reflected in its net positive migration among the college-aged. This positive balance turns net negative, however, among those in their 20s and especially among those in their early 30s, after which the county shows a stable, though slightly negative, migration trend. Waukesha County, in contrast, shows a different pattern. About 3,400 people aged 18 to 19 leave the area from Waukesha County alone. Of these, only about 600 move to Milwaukee County, while most move out of the five-county area. Waukesha County loses smaller numbers of people in their 20s and achieves small net growth among 30-somethings—a group Milwaukee slips with.

**Changes in Migration Patterns over Time**

In the 2000 decennial census, U.S. residents were asked where they had lived in 1995. The information gathered shows that Milwaukee County lost an average of 9,600 more people than it gained to migration each year during the late 1990s. Over

## The fact that no county was able to break even (let alone grow) in net regional migration is a reason not to celebrate yet. Still, there are positive signs.

the same time period, a net of 1,800 people moved to Waukesha County each year; Ozaukee and Washington posted smaller gains; and Racine averaged a loss of about 800 annually.

By 2015, circumstances had changed. During that year, the Census Bureau estimates that Milwaukee County lost only 3,700 people in net migration—more than a 60 percent improvement from a decade and a half earlier. While Milwaukee's losses were stemmed, Waukesha's growth had slowed. Only 300 more people moved in than left.

The fact that Waukesha's growth slowed as Milwaukee's migration health improved is not a coincidence. In fact, Waukesha's comparatively robust late-1990s growth did not represent regional health at all. Waukesha was not attracting large numbers of migrants from elsewhere in the country. It was mostly collecting people leaving Milwaukee.

This is clear when we look at net migration in and out of the five-county region instead of in and out of each county. In the late 1990s, about 3,800 more people each year moved from Milwaukee County to somewhere beyond the five-county region than vice versa. About 2,100 more people from Waukesha left the five-county area than entered the county from outside the region. Ozaukee lost 400 people annually to regional net migration, Racine lost 1,000, and Washington lost 900. In other words, none of the five counties managed to attract more migrants from *outside* the region than it lost. The positive net migration posted by the individual WOW (Waukesha–Ozaukee–Washington) counties would instead have been negative but for their gains from Milwaukee and Racine.

Regionally, the situation has improved, if only a little. From 1995 to 2000, the five-county region as a whole lost around 8,000 people per year to net migration. Forty-six percent of the loss came from Milwaukee County. By contrast, in 2015 the region lost slightly fewer—7,000—people to net migration. Regional migration losses increased in Ozaukee and Racine, but they decreased in Waukesha, Washington,

and Milwaukee. Milwaukee County's improvement has been the most significant, accounting for only 34 percent of this loss. Waukesha County contributed 27 percent. The fact that no county was able to break even (let alone grow) in net regional migration is a reason not to celebrate yet. Still, there are positive signs. The five-county region's net losses have declined in both absolute terms and as a proportion of the total population. The greatest improvement has come in Milwaukee County, where the number of people leaving has dropped to a level such that it now contributes an amount of the region's leavers similar to Waukesha's. Along with similar trends in employment and commuting, this suggests that structural differences between the region's counties have declined.

### Conclusion

The Milwaukee area has improved its migration performance over the past decade and a half—most notably in Milwaukee County itself. But the area still falls behind other metropolitan areas of the state in attracting new residents. In terms of migrants from out of state, the Milwaukee area faces stiff competition, especially from Dane County. And much of the migration *within* the state goes disproportionately to neither Dane nor Milwaukee but rather to smaller metropolitan counties.

To the extent that the Milwaukee area seeks to expand its population and workforce through attracting migrants to the state, it may first look to Illinois, which is a net provider of new Wisconsin residents from the Chicago area. In fact, state officials recently began marketing in the Chicago area to encourage people to move to Wisconsin, a step that has stirred some controversy in both Wisconsin and Illinois.

In all events, Wisconsin's relatively slow population growth in recent years may limit the workforce that it can provide unless migration into the state, and specifically into the five-county Milwaukee area, improves further—indeed, becomes net positive. ■



John D. Johnson



Charles Franklin