Legal scholars have long predicted that the increasing interconnectedness of the global economy, coupled with new technologies that decrease the salience of geography, will present new challenges for the field of conflict of laws. Less predictable, but equally significant, are the issues raised by some states’ recognition of same-sex marriage, and by the detention and interrogation of aliens outside the boundaries of the United States as part of American antiterror activities.

From one perspective, the topics are quite distinct. One arises from global transactions, one from domestic interstate relations, and one from conduct entirely outside the United States. Each, though, is on the cutting edge of conflicts; each challenges scholars, practitioners, and judges as they bring conflicts into the new century.
These topics formed the basis for the Symposium conducted November 12, 2004, at the University of Pennsylvania Law School. The papers gathered in this issue of the Law Review were presented at three panels. The first, addressing choice of law and jurisdiction on the Internet, featured papers from Paul Schiff Berman, Erin O’Hara, Joel Reidenberg, and Peter Swire. Allan Stein moderated and served as commentator.

Paul Berman’s paper argues for what he calls a cosmopolitan vision of the conflict of laws. Building on a now-classic article previously published in the University of Pennsylvania Law Review, Berman argues that the diminishing significance of geography has undermined the idea of the territorially bounded nation-state as the basic unit of analysis for conflicts purpose. Instead, Berman suggests that courts should recognize the possibility that people can hold multiple, sometimes nonterritorial community affiliations, and also that communities other than conventional nation-states can assert forms of legal or quasi-legal jurisdiction.

Erin O’Hara’s contribution examines the rapidly growing world of online commerce. She investigates the possibility that a lack of trust of unknown vendors reduces the efficiency of the market for online purchases. Having concluded that distrust of unknown vendors represents a negative externality, she explores the extent to which contract doctrine could serve a coordinating function for vendor behavior that might work to promote consumer trust in unknown vendors.

Joel Reidenberg’s paper considers the disputes about jurisdiction over Internet activities as part of the larger struggle to establish the rule of law in the Information Society. He argues that attempts to deny jurisdiction constitute a type of “denial of service” attack against the legal system. He then examines the ways in which innovations in information technology tend to undermine the technological assaults on state jurisdiction, and ways in which the same innovations may allow states to enforce their decisions electronically and to bypass the problems of foreign recognition and enforcement of judgments.

Peter Swire starts with the observation that true choice-of-law cases dealing with Internet activity are surprisingly few. He explains the dearth of conflicts as a product of four factors: technology’s ability to trump law; lack of jurisdiction over defendants; the harmonization of diverse laws; and the existence of self-regulatory and other systems that suppress choice-of-law conflicts for transactions. Swire then offers a taxonomy of those disputes that will present true choice-of-law prob-
lems, and an explanation of how different sorts of entities will be subject to legal regulation or may avoid it.

Allan Stein’s commentary, focusing on the papers by Paul Berman and Joel Reidenberg, reassesses the extent to which the greater connectedness brought about by globalization and new technology will affect our jurisdictional attitudes. While the overall effect may be one of increased sensitivity to the multiple sources of power and authority in a wired world, he notes that technology can separate as well as connect, and considers the appropriate response to the possibility of parochialism.

The second panel considered the question of the constitutional rights of aliens abroad, with special reference to *Rasul v. Bush*, the recent Supreme Court decision about the status of the Guantanamo detainees. Diane Amann’s paper explores the process by which a space freed of the constraints of law became possible. She attributes its creation not to a lack of applicable law, for both international law such as the Geneva Conventions and domestic law such as the habeas statute set out standards and procedures for assessing and challenging the legal validity of detention and interrogation. Instead, she argues, the legal black hole emerged from a lack of vision regarding legal constraints. She goes on to analyze why conflicts and public international law failed to establish the rule of law.

My paper considers the case of the Guantanamo detainees as a window on the broader question of the constitutional rights of aliens abroad. I argue that conflicts provides the appropriate analytical framework for considering this question, and that the application of different conflicts methodologies can teach us something about the merits and demerits of those methodologies as well. In writing this paper I benefited from the pathbreaking and comprehensive work of Gerald Neuman, and it was a treat to have Neuman present to give comments. His reply, no less probing for its graciousness, questions the value of the conflicts perspective and concludes that conflict of laws is more in need of methodology than itself a source of methodology.

The last panel considered the implication of Massachusetts’s decision to recognize same-sex marriages. Given the highly divisive nature of the debate over same-sex marriage, the panelists displayed a remarkable ability to shed light without heat in discussing the choice-of-law issues. Andrew Koppelman’s paper offers guidance to judges on the circumstances in which same-sex marriages should be recognized. He distinguishes between “evasive” marriages, in which parties have
traveled out of their home state for the express purpose of evading that state's prohibition of their marriage and then returned home immediately; "migratory" marriages, in which the parties did not intend to evade the law of any state when they married, but contracted a marriage valid where they lived and subsequently moved to a state where their marriage was prohibited; "visitor" marriages, in which a couple or a member of a couple is temporarily present in a state that does not recognize their marriage; and "extraterritorial" cases, in which a court is called upon to assess the validity of the marriage of a couple not living within the state. Evasive marriages, Koppelman concludes, should not be recognized if they violate forum public policy. Migratory marriages present hard questions, but generally should be recognized, especially if the incident at issue is one obtainable by contract under forum law. In visitor and extraterritorial cases, he argues, the marriages should clearly be recognized.

Linda Silberman's paper offers a normative analysis for the conflicts issues raised by same-sex marriage, one that reflects the needs and values of our federal system and gives genuine respect to the decision made in a relevant community about the desirability of permitting same-sex marriage. Like Koppelman, she creates a taxonomy of marriages, distinguishing between "evasion" marriages, "mobile" marriages, and "transient effects." She analyzes the possible state treatments of these different issues both in terms of what the Constitution allows and in terms of what good conflicts policy suggests.

Tobias Wolff considers the specific question of the justifications that a state might offer for refusing to recognize a same-sex marriage solemnized in another state. Rather than simply accepting the idea that a broad and undifferentiated "public policy" objection suffices, he suggests that recent constitutional developments narrow the permissible range of reasons. Drawing upon Lawrence v. Texas, Romer v. Evans, and Saenz v. Roe, he argues that the logic of these decisions has significantly altered the landscape for interest analysis in recognition cases. Herma Hill Kay moderated the panel and provided comments on the presentations.

This Symposium brought together a talented group of scholars to address difficult and complicated issues whose importance is only growing. The papers collected in this volume present the views of leading conflicts thinkers on the latest set of conflicts problems.