

**CONTENTS**

	PAGE
<b>ISAAC MARKS MEMORIAL LECTURE</b>	
A SENATOR'S PERSPECTIVE ON AMERICAN HIGHER EDUCATION IN A GLOBAL ECONOMY	<i>Edward M. Kennedy</i> 1

**ARTICLES**

RULE 10B-5 AND THE "UNFITNESS" QUESTION	<i>Jayne W. Barnard</i> 9
--	---------------------------

The Sarbanes-Oxley Act provides that, in a litigated proceeding brought by the SEC or in a cease-and-desist proceeding before the SEC, a securities law violator who is found to be "unfit" may be barred from serving as an officer or director of a public company. This Article sets out a roadmap for determining when a violator is "unfit." Drawing on related areas of the law, and utilizing the Federal Sentencing Guidelines as a framework, the Article sets out a nine-factor test for determining "unfitness," and discusses the due process issues surrounding the "unfitness" inquiry.

THE FUNCTIONS OF TRANSACTION COSTS: RETHINKING TRANSACTION COST MINIMIZATION IN A WORLD OF FRICTION	<i>David M. Driesen &amp; Shubha Ghosh</i> 61
--	---

This Article critically examines the goal of minimizing transaction costs, including the costs of legal decision-making. This goal has profoundly influenced legal scholarship and both public and private law. We argue that transaction costs purchase corollary benefits. They frequently enable those engaging in transactions to obtain information needed to correct for information asymmetries or inadequate information. They perform the functions of facilitating efficient transactions, allowing the avoidance of bad transactions, and serving important equitable goals. It follows that lawmakers must take transaction cost functions into account when deciding whether eliminating them is desirable. We discuss how to identify transaction cost functions and how to take these functions into account in choosing legal rules.

USING THE MASTER'S "TOOL" TO DISMANTLE HIS HOUSE: WHY JUSTICE CLARENCE THOMAS MAKES THE CASE FOR AFFIRMATIVE ACTION	<i>Angela Onwuachi-Willig</i>	113
--	-------------------------------	-----

Justice Clarence Thomas is known for his strong opposition to affirmative action. His critics condemn him for attacking the very preferences that helped him reach the Supreme Court. None, however, have considered how Thomas's life itself may be used to justify affirmative action.

This Article analyzes Justice Thomas's appointment to the Supreme Court and contends that his nomination to and performance on the Court ironically make the case for forward-looking affirmative action. Specifically, this Article examines various pro-affirmative action arguments and utilizes them to explain how Justice Thomas himself actually lends support to a continuation of forward-looking affirmative action.

## NOTES

QUASI-COMMUNITY PROPERTY IN ARIZONA: WHY JUST AT DIVORCE AND NOT DEATH?	<i>Mark Patton</i>	167
QUESTIONABLE MEDICINE—WHY FEDERAL MEDICAL MALPRACTICE REFORM MAY BE UNCONSTITUTIONAL	<i>Collin Sult</i>	195

## ARIZONA CASE NOTES

<i>STANLEY V. MCCARVER</i>	<i>Patrick I. Biggerstaff</i>	223
<i>STATE V. AGUILAR</i>	<i>Alexandra G. Foote-Jones</i>	229
<i>CLEAN ELECTIONS INSTITUTE, INC. V. BREWER</i>	<i>Matthew O. Gray</i>	237