



1997

Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived

Robert M. Parker

Ron Jr. Chapman

Follow this and additional works at: <http://scholar.smu.edu/smulr>

Recommended Citation

Robert M. Parker, et al., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. Rev. 573 (1997)
<http://scholar.smu.edu/smulr/vol50/iss2/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Essays

ACCEPTING REALITY: THE TIME FOR ADOPTING DISCRETIONARY REVIEW IN THE COURTS OF APPEALS HAS ARRIVED

*Judge Robert M. Parker**
*Ron Chapman, Jr.***

TABLE OF CONTENTS

I. THE VOLUME CRISIS	574
II. ANALYZING DISCRETIONARY REVIEW.....	576
A. SUMMARY PROCEDURES—THE CURRENT APPROACH .	576
B. THE PROS AND CONS OF DISCRETIONARY PROCEDURE.....	578
III. DISCRETIONARY REVIEW AND THE RIGHT TO AN APPEAL	579

NOBODY disputes the enormous volume crisis currently facing the federal courts of appeals. Much disagreement exists, however, as to what to do about it. Many proposals have been offered that would tinker with the structure of the current system. We could add more judges. We could increase the size of judicial staffs. We could redraw boundary lines, creating fewer larger circuits or more

* Judge, United States Court of Appeals for the Fifth Circuit. B.B.A., University of Texas, 1961; J.D., University of Texas School of Law, 1964. Prior to his elevation to the Fifth Circuit, Judge Parker served for 15 years as a district court judge for the United States District Court of the Eastern District of Texas, the last four of those years as Chief Judge. In addition, Judge Parker chaired the United States Judicial Conference's Committee on Court Administration and Case Management from 1990-93. Also from 1990-91, Judge Parker served as a member of the Judicial Conference's Ad Hoc Committee on Asbestos Litigation, and from 1987-90, he served as a member of the Judicial Conference's Committee on Judicial Improvements.

** Law Clerk to Judge Robert M. Parker, 1995-96. Mr. Chapman graduated *cum laude* from SMU School of Law in 1995, where he was a member of the Order of the Coif. Currently, he is an associate with Strasburger & Price, L.L.P., in Dallas, Texas. His practice focuses on labor and employment law, and he is a member of the Employment Law Sections of the American Bar Association, the Texas Bar, and the Dallas Bar Association. Mr. Chapman is the author of *Judicial Roulette: Alternatives to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to At-Large Judicial Elections*, 48 SMU L. REV. 457 (1995).

smaller circuits. However, none of these changes, even if implemented, would affect reality; the volume crisis is not curable by tinkering with the structure of the courts or the number of people considering appeals. Just as we cannot build enough prisons to house all our criminals, we cannot build enough courts to hear all our cases. There are only two ways to deal with the volume crisis:

One is to decrease the total number of cases that are filed in the district courts, thus decreasing the total universe of federal cases and hence the number of judgments from which appeals can be taken. The other is simply not to permit appeals from all of the final judgments and other decisions of district courts and administrative agencies that are now appealable.¹

The trend toward more filings in the district courts is not likely to change, especially in light of the continuing federalization of state-law crimes and the creation of more civil causes of action by Congress. This leaves only one alternative: we must no longer permit appeals for every dispute. The time has come to accept reality and adopt discretionary review in the courts of appeals.

Through the use of various summary procedures, the courts of appeals themselves have recognized the need for different approaches to different types of cases. Meritless appeals are discarded as quickly and with as little effort as possible. Under a truly discretionary system, the courts of appeals could avoid the facade of full deliberation and its corresponding inefficiency and assure that those appeals deserving of full deliberative treatment will receive it.

Part I of this Essay will explore the volume crisis, the reasons for it, and projections for the future. Part II will explain how the current summary procedures are inadequate and examine the pros and cons of adopting a truly discretionary procedure. Part III will then analyze how the courts could implement such a plan without hindering the right to an appeal.

I. THE VOLUME CRISIS

There is a statistic for everything, and there are many examples of dubious "crises" based on one statistical study or another. However, the volume crisis is neither invented nor exaggerated. Rather, it is real and completely identifiable by legitimate research.

The federal circuit courts received 2830 appeals in 1950.² In 1970, there were 11,662 appeals, up more than 400%.³ By 1990, the number of appeals filed had increased to 41,000, and by 1994, that number was approaching 49,000—up more than 1700% from 1950.⁴ Between 1989 and

1. Alvin B. Rubin, *Reallocation: A Two-Way Street*, in *THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY* 123 (Federal Judicial Center ed., 1989).

2. Richard S. Arnold, *The Future of the Federal Courts*, 60 *Mo. L. Rev.* 533, 535 (1995).

3. *Id.*

4. *Id.*

1993 alone, the number of federal appeals rose by more than 25%.⁵

Statistics within the Fifth Circuit are similar. In 1960, there were 577 appeals filed in the Fifth Circuit.⁶ By 1993, that figure was up to 6411, an increase of over 1100%.⁷

To place these figures in perspective, consider the impact on the individual judge. In 1960, the Fifth Circuit consisted of seven judges—meaning 82 cases per judge.⁸ In 1991, there were 13 judges on the court and 6165 appeals—meaning 474 cases per judge.⁹ These figures do not include the nonstop motions and petitions for rehearings,¹⁰ or the numerous administrative matters that require judicial attention.¹¹

The reasons for this skyrocketing of appellate filings are twofold: (1) the federalization of state crimes, and (2) the congressional enactment of a multitude of civil causes of action. Neither trend is likely to change. In *United States v. Lopez*,¹² the Supreme Court inspired some hope in those frustrated by these trends by striking down the Gun Free School Zones Act as an unconstitutional use of congressional power under the Commerce Clause.¹³ But subsequent cases have come to see *Lopez* as an extreme example, an aberration, rather than the end of the trend toward federalizing state crimes.¹⁴ Similarly, congressionally created civil causes

5. David A. Nelson, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals*, 47 ADMIN. L. REV. 111 (1995) (reviewing Thomas E. Baker's book of same title); see Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 12, nn. 5-9 (1996) (citing numerous studies of the volume crisis facing the courts of appeals).

6. Robert M. Parker, *Foreword*, 26 TEX. TECH. L. REV. 265, 265 (1995).

7. *Id.*

8. Carolyn D. King, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 955 (1991).

9. *Id.* at 955-56.

10. As many as 496 per judge per year. *Id.* at 956.

11. *Id.*

12. 115 S. Ct. 1624 (1995).

13. *Id.* at 1626.

14. See *United States v. Bell*, 70 F.3d 495, 497 (7th Cir. 1995) (collecting cases) ("It appears that *United States v. Lopez* has raised many false hopes. Defendants have used it as a basis for challenges to various statutes. Almost invariably those challenges fail."); see also Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995). Professor Regan states:

Lopez is [not] likely to inaugurate a major change in the Court's inclination to uphold federal legislation. Justice Kennedy, speaking also for Justice O'Connor, makes clear in his concurrence that for him *Lopez* itself is a hard case, and Justice Rehnquist, writing for the Court, shows no sign of any intention to overturn the major Commerce Clause precedents since 1937.

Id. at 554. See also Jay M. Cohen & David J. Fried, *United States v. Lopez and the Federalization of Criminal Law*, 29 PROSECUTOR, Nov.-Dec. 1995, at 23 ("A careful examination of the opinion in *Lopez*, however, reveals that there is little revolutionary about it. . . . *Lopez* is simply the case in which the Court finally held that Congress has transgressed the limit; it is not inconsistent with the precedents."); Stephen M. McJohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 4 (1995) ("the doctrinal limits of *Lopez* will in practice be more modest than its rhetoric suggests"); Charles B. Schweitzer, Comment, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DUQ. L. REV. 71, 73-74 (1995) ("The tone of the majority and concurring opinions indicates that the Justices do not wish to return, as a practical matter, to the original conception of commerce adhered to by the Framers, a notion the dissenting opinions reinforce.").

of action continue to increase.¹⁵ Moreover, even if these trends miraculously ceased tomorrow, the continued growth of the population and economy still would expand the amount of litigation. Exacerbating these trends, the proclivity to appeal district court losses is also on the rise.¹⁶

If these trends continue, the courts will experience 90,114 appeals in the year 2000.¹⁷ The courts will face 198,147 appellate filings in 2010 and 428,203 in 2020.¹⁸ The more appeals there are, the less attention and deliberation a judge may give to each individual case.¹⁹ Not only is the crisis present today, it's going to become catastrophic tomorrow. "There is no point clinging to the past if the future arrived years ago."²⁰

II. ANALYZING DISCRETIONARY REVIEW

A. SUMMARY PROCEDURES—THE CURRENT APPROACH

Preparation for the future must begin now. After a multitude of studies, committees, and task forces, our court system has implemented nothing that will equip it to address adequately the exponentially growing workload. Most of the current proposals center around either (1) adding judges or staff, or (2) redrawing circuit lines. Neither approach will suffice. Simply adding judges will create only chaos:

[A]s Judge Posner puts it, "beyond a certain point there are too many judges to deliberate effectively." In particular, as the number of judges increases, the difficulty of maintaining uniformity of decisions becomes almost insuperable. The members of the court must struggle even to keep up with other judges' opinions, let alone to identify and eliminate conflicts in language or result.²¹

Nor will adding more law clerks help:

With three law clerks, you're about at your limit as to what a single judge can absorb. Judges are like funnels: there's a big opening at the top and all the law clerks and the staff attorneys pour stuff in there. There's just a little funnel at the bottom. It all has to go through that one person. And unless the judge widens out that bottom so that it all just drops through rubber-stamped, you're not really getting any more done.²²

15. Parker, *supra* note 6, at 265.

16. *Id.*

17. Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System: Thinking the Unthinkable*, 14 MISS. C. L. REV. 349, 391 (1994).

18. *Id.*

19. See Arnold, *supra* note 2, at 538, 542.

20. King, *supra* note 8, at 959.

21. Arthur D. Hellman, *Courting Disaster*, 39 STAN. L. REV. 297, 305 (1986) (footnotes omitted) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)); see *Lumbermen's Mut. Casualty Co. v. Elbert*, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring) ("The business of courts, particularly of the federal courts, is drastically unlike the business of factories. The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but far-reaching, which cannot be satisfied by enlarging the judicial plant.").

22. Arnold, *supra* note 2, at 543.

Similarly, altering the boundary lines for the various circuits, by either creating fewer larger circuits or more smaller circuits, will not be effective. Rather, these proposals would create even more problems. On the one hand, mega-circuits “disturb the clarity and stability of the law, which in turn increases litigiousness and complicates the disposition of cases.”²³ On the other hand, a system of many small circuits “dilutes the federalizing function of the courts of appeals.”²⁴ Most significantly, redrawing the circuits will affect neither the number of appeals filed nor the number of appeals to be heard.

Thus, mere tinkering with size or structure will not suffice. “[A] radical approach is necessary. Time is of the essence. . . . [I]t is time to start thinking ‘big.’ Incremental [steps] will not solve our problem.”²⁵ The time has arrived for the federal courts of appeals to adopt a system of discretionary review.

Current circuit court procedures implemented in response to the volume crisis underscore the need to allow the courts discretion in approaching different types of cases. More and more, courts are using “summary calendar” and “conference calendar” treatment of cases rather than issuing decisions after oral argument and full deliberation.²⁶ Similarly, an increasing number of appeals are decided with one word—“Affirmed”—or with extremely terse language—“We agree with the decision of the district court.”²⁷

However, these methods are an inadequate means of combating the volume crisis. These procedures have caused judges to become in large part case processors, not jurists,²⁸ as their full attention is given to only a few cases each year.²⁹ Judge King notes that under such circumstances, “a two-track system can slip in to [sic] the modus operandi of even a conscientious but overloaded judge without the judge even being aware of it.”³⁰ That is precisely what has happened. Many judges are so overwhelmed that they must use their discretion and devote their full attention to only a few cases. The remaining cases are given “summary treatment.” Many are affirmed in one word, in a few paragraphs, or on the basis of an opinion written by staff counsel or a law clerk with no direction whatsoever from the judge. As Judge Reinhardt of the Ninth Circuit has said, “Those who believe we are doing the same quality work

23. Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 220 (1994).

24. FEDERAL JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 114 (1993) (citing John M. Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787, 788 (1980)).

25. Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52, 54.

26. Parker, *supra* note 6, at 265.

27. See Reinhardt, *supra* note 25, at 52.

28. See King, *supra* note 8, at 957-58.

29. *Id.* at 958; see Dragich, *supra* note 5, at 30-32.

30. King, *supra* note 8, at 963.

that we did in the past are simply fooling themselves."³¹ Judge Lay agrees, stating that "courts of appeals today may provide in many appeals only an appearance of justice rather than justice itself."³² In short, a large part of what now occurs in the federal courts of appeals is "routine, administrative decision making instead of the individualized deliberative processes normally associated with judicial decisions."³³ In a discretionary system, judges would not have to spend as much time and energy on the undeserving cases, thereby allowing more deliberation on those cases that warrant it.

B. THE PROS AND CONS OF DISCRETIONARY PROCEDURE

"The question is not whether justice (however you define that rather slippery term) shall be rationed, but how and to what extent it shall be rationed."³⁴ The courts already ration justice, and not all appeals deserve the same level of attention.³⁵ Other than simply limiting the number of cases filed at the district court level, only discretionary review would have a tangible impact on the volume crisis. Discretionary review would assure full review of those cases that deserve it, and the quality of the entire appellate process would be improved: "[T]he discretionary approach would save time, money, and effort. Those cases that courts do designate for review would receive better treatment, including traditional collegial and deliberative appellate procedure, because judges would be processing fewer other appeals."³⁶

The main potential drawback to a discretionary system is that "the discretionary procedure would additionally compromise the ability of circuits to correct errors and could ration their scarce resources into specific classes of cases which are deemed more worthy of consideration than others."³⁷ As Judge King has explained, "Every nation must be evaluated, in part, by the way in which it deals with its most vulnerable citizens. . . . [W]hen there is simply not enough judicial time to go around, the temptation is to give shorter shrift to the cases brought by our most vulnerable citizens."³⁸ This danger is real, and it should not be dismissed. Because of the potential for misuse of this discretion, the system should monitor the courts of appeals carefully. However, this hazard fails to outweigh the merits of adopting discretionary review.

31. Reinhardt, *supra* note 25, at 53; see Arnold, *supra* note 2, at 538 ("The volume problem is causing us to have too little time to think about some of the hard cases as much as we need to.").

32. Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 Sw. L.J. 1151, 1155 (1981).

33. Steven O. Ludd, Book Review, 25 J.L. & EDUC. 174, 177 (1996) (reviewing CHRISTOPHER E. SMITH, *JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION* (1995)).

34. Nelson, *supra* note 5, at 114.

35. Parker, *supra* note 6, at 265; Arnold, *supra* note 2, at 536-37.

36. Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357, 1402-03 (1995) (footnotes omitted).

37. *Id.* at 1403 (footnote omitted).

38. King, *supra* note 8, at 963.

First, to the extent that our “most vulnerable citizens” might be given “shorter shrift” by our judicial system, there is no indication that a procedure of discretionary review would be any worse than the present system. Currently, with so much pressure on judges to get cases out while papers continue to accumulate, there is a real danger that judges will select the “nonsexy” cases for quick resolution. Similarly, a discretionary system would create a danger that the courts would ignore the low-profile or “typical” cases.

While the “it couldn’t get any worse” argument is not very comforting or appealing, it is indicative of just how bad the current deliberative environment is and how much a change is needed. As stated previously, the danger of unequal treatment is real and requires attention. However, it is not a problem that would be new under a discretionary system.

Second, the benefits of a discretionary system outweigh its potential drawbacks. Maintaining the facade of full deliberation under the current system is time-consuming and expensive. A discretionary system would allow a more honest description of what actually occurs. Furthermore, a discretionary system would improve the quality of the entire appellate process because it would ensure that the deserving cases do receive full deliberative treatment.

Last, a discretionary system would emphasize the importance of having the most qualified jurists possible at the trial court level, as these courts would often have the last word in resolving disputes. Highlighting the importance of having the best district judges possible would benefit the entire legal system.

III. DISCRETIONARY REVIEW AND THE RIGHT TO AN APPEAL

There is no constitutional right to an appeal.³⁹ The so-called “right to an appeal” derives from 28 U.S.C. § 1291, which states that the courts of appeals have jurisdiction to hear appeals from final decisions of the district courts.⁴⁰ The explicit wording of this statute does not mandate that the courts of appeals actually exercise that jurisdiction. Nevertheless, it is generally accepted that § 1291 confers a right to an appeal.⁴¹

39. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Abney v. United States*, 431 U.S. 651, 656 (1977).

40. 28 U.S.C. § 1291 (1994) (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts.”); see Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 & n.4 (1985) (“It has long been clear that the right to appeal is statutory, and is not constitutionally compelled.”). Rule 3 of the Federal Rules of Appellate Procedure is entitled “Appeal as of Right—How Taken.” FED. R. APP. P. 3. However, the actual wording of Rule 3 refers to “[a]n appeal permitted by law as of right.” *Id.* Thus, Rule 3 does not create any right to an appeal independent of what is otherwise permitted by existing law.

41. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 392 (1994) (“Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments.”); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865 (1994) (“Section 1291 of the Judicial Code confines appeals as of right to those from ‘final decisions of the district

A system of discretionary review would satisfy that right:

[A]ll that an appeal as of right connotes is that the litigant who lost in the trial court has a right to put his case before an appellate tribunal, and to have that tribunal consider his contentions that the judgment should not stand. It does not necessarily carry with it a commitment to particular procedures.⁴²

A system of discretionary review would fulfill this appellate role. Even if the court denies review, it still will have considered, to some extent, the litigant's contentions that the judgment should not stand.

In *National Labor Relations Board v. Local No. 42, International Ass'n of Heat & Frost Insulators & Asbestos Workers*,⁴³ the Third Circuit upheld a denial of oral argument against a due process challenge because any one member of the panel could have required oral argument and the vote as to whether to have oral argument came only after the panel had received the briefs in each case.⁴⁴ Similarly, a court of appeals could adopt a system of discretionary review where the briefs (or a petition for review) were received prior to any decision and one member of a panel could require review. Although the right to an appeal is revered,⁴⁵ a discretionary system would not infringe on either due process or the statu-

courts."); *Hardy v. United States*, 375 U.S. 277, 278 (1964) ("We deal with the federal system where the appeal is a matter of right."); *Stelly v. Commissioner*, 761 F.2d 1113, 1116 (5th Cir.) ("All citizens have the right to litigate with their government and the right to appeal any adverse decision of a trial court."), *cert. denied*, 474 U.S. 851 (1985); *In re McClinn*, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc) ("Every party is entitled to a full, considered, and impartial review of the decision of the trial court."); *Arrastia v. United States*, 455 F.2d 736, 739 (5th Cir. 1972) ("A direct appeal from a United States [d]istrict court to a court of appeals is in effect a matter of right."); *Brewen v. United States*, 375 F.2d 285, 286 (5th Cir. 1967) ("It is settled that an appeal from the judgment of a federal [d]istrict [c]ourt is a matter of right.").

42. Hellman, *supra* note 21, at 304 (internal quotations and citations omitted). *But see* Lay, *supra* note 32, at 1151 (quoting Thomas Kallay, *The Dismissal of Frivolous Appeals by the California Courts of Appeal*, 54 CAL. ST. B.J. 92, 92 (1979) ("If a party can perfect an appeal as a matter of right, he should necessarily be entitled to the benefits of the entire deliberative process offered by the forum to which he has taken his appeal."). However, the courts of appeals, through the use of decisions without oral argument or even an opinion, are already not giving all the benefits of the entire deliberative process. "Once a litigant is denied his right to have counsel present during oral argument in a case worthy of appeal, he has indeed lost his right to the full deliberative process of the court." *Id.* at 1154. "[T]hrough the lessening of the full deliberative process, courts of appeals are, in reality, invoking a form of discretionary dismissal without calling it such." *Id.* at 1155. Thus, discretionary review is merely one more step down the spectrum of denying benefits of the full deliberative process to unworthy cases. Just as the other procedures satisfy the right to an appeal, so does discretionary review.

43. 476 F.2d 275 (3d Cir.), *cert. denied*, 412 U.S. 940 (1973).

44. *Id.* at 276.

45. *See* Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 922 (1994) ("The theoretical problem with discretion being the rule is the effect such a structural reform would have on the federal appellate ideal."); Dalton, *supra* note 40, at 62 ("Although its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct."); AMERICAN BAR ASS'N COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.10 commentary at 14 (1977) ("The right of appeal, while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country.").

tory right of an appeal.⁴⁶

In analyzing other procedures created by the courts of appeals, the Supreme Court has said that “[t]he requirements imposed by that guaranty [due process] are not technical, nor is any particular form of procedure necessary.”⁴⁷ Similarly, the guarantees of the statutory right of appeal should not be viewed as technical or requiring a particular form of procedure. The procedure due process requires “varies from case to case in accordance with differing circumstances. . . .”⁴⁸

Some courts have indicated that the statutory right to an appeal is not absolute. In *Free v. United States*,⁴⁹ Judge Posner wrote that “[a]busers of the judicial process are not entitled to sue . . . , period.”⁵⁰ This limitation on access to the courts, however, is not limited to abusers of the system. “At a time of staggering federal caseloads, the need to devise alternative remedies for classes of litigation that do not imperatively require the full Article III treatment is urgent.”⁵¹ Additionally, “[e]ven though we espouse the notion that all litigants deserve equal access to the courts, we have long accepted restricted access and the provision of different treatment for different kinds of disputes.”⁵²

Fifth Circuit Local Rule 47.6, which provides for affirmance without an opinion, is but one example of how courts may change the procedures of the appellate process without affecting the statutory right to an appeal.⁵³ Local Rule 47.6 is merely an example of “different treatment for different kinds of disputes.”

Thus, even though there is an acknowledged statutory right to an appeal, a system of discretionary review would satisfy that right. The remaining question is who has the power to implement such a system.

Clearly, Congress, which created the courts of appeals, could enact legislation implementing a system of discretionary review for those courts. Additionally, the Supreme Court could provide for discretionary review for the courts of appeals. The Supreme Court has rulemaking power over

46. *But see* 15A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3901, at 24 (2d ed. 1992) (“[I]t should be clear that a court of appeals cannot properly refuse decision of a case within its jurisdiction simply because it seems too trivial to consort with the court’s dignity or pressing workload.”).

47. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 710 (1945).

48. *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 276 (1949).

49. 879 F.2d 1535 (7th Cir. 1989).

50. *Id.* at 1536.

51. *Id.*; *see also* *Lucien v. Johnson*, 61 F.3d 573, 575 (7th Cir. 1995) (Posner, J.); *Savage v. CIA*, 826 F.2d 561, 563 (7th Cir. 1987) (Posner, J.); *Tinker-Bey v. Meyers*, 800 F.2d 710 (7th Cir. 1986) (Posner, J.).

52. *Judith Resnik, Precluding Appeals*, 70 CORNELL L. REV. 603, 611 (1985); *see Parker, supra* note 6, at 268 (“Arguably . . . the appeal as of right has already been significantly undermined by the prevalent use of summary disposition and affirmance without opinion by the courts of appeals.”).

53. 5TH CIR. R. 47.6 (may affirm without opinion where (1) an opinion would have no precedential value; and (2) a district court’s judgment is not clearly erroneous, sufficient evidence supports a jury verdict, substantial evidence supports an administrative ruling, a summary judgment raises no genuine issue of material fact, or where no reversible error of law appears).

practice and procedure.⁵⁴ The rules adopted by the Supreme Court may not "abridge, enlarge or modify any substantive right."⁵⁵ But because discretionary review would not infringe on the right to an appeal, the Supreme Court could establish the procedure by rule.

Furthermore, the courts of appeals themselves "may regulate their practice in any manner not inconsistent with" the Federal Rules of Appellate Procedure.⁵⁶ Again, because discretionary review satisfies the statutory right to an appeal, such a system would not be inconsistent with the Federal Rules. Additionally, the courts of appeals may have unilateral, "inherent powers" to implement such a plan.⁵⁷

In short, the future cannot be put off any longer. The volume crisis is crippling our appellate system, and projections for the future are even worse. The courts must do something now. Discretionary review would save time, money, and effort and would more honestly describe the system currently in place, a system in which courts exercise discretion behind a facade of deliberation. Most importantly, a discretionary system would benefit the entire appellate process, as it would enable judges to give full deliberation to those cases that deserve it, instead of spending time and energy on cases that do not. The future is here. We had better accept it.

54. 28 U.S.C. § 2072(a) (1994).

55. *Id.* § 2072(b).

56. FED. R. APP. P. 47.

57. See Parker & Hagin, *supra* note 23, at 236; see also *Abney v. United States*, 431 U.S. 651, 662 n.8 ("It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims.").