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COMPARATIVE DOMESTIC CONSTITUTIONALISM: RETHINKING CRIMINAL PROCEDURE USING THE ADMINISTRATIVE CONSTITUTION

I. INTRODUCTION: THE LAY OF THE LANDS

The Administrative Procedure Act (APA) is as much a constitution as a statute. As with all constitutions, the nature of the APA goes far in determining the topography of the procedural landscape that grows upon it. The Act regulates agency procedure by creating a transsubstantive procedural floor applicable to virtually all agencies that may be, and often is, supplemented by substance-specific procedures that Congress and agencies establish. (Courts, importantly, are forbidden by Supreme Court precedent from imposing procedural requirements that exceed those contained in the APA.) To the geographically inclined, the APA is the floor of a broad procedural valley; across the valley lie scattered hills of substance-specific procedure piled up by agencies and legislatures based on judgments about which procedures befit which agencies. The resulting landscape is an uneven terrain in which all agencies share a basic procedure, but procedural requirements as a whole differ from agency to agency and, consequently, subject matter to subject matter.

This administrative constitution accords agencies wide discretion to enact rules and adjudicate controversies, which courts review for "reasonableness." When courts do overturn an agency's action — or, rarely, a congressional delegation — they tend to do so through the imposition of rules that generate incentives for structured processes, rather than through commands that impose specific procedures for agency actors to follow. United States v. Mead Corp., for example, dangles Chevron deference as a carrot to entice Congress and agencies

2 See, e.g., Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 CHI.-KENT L. REV. 1039, 1039 (1997) (explaining that, in important ways, "our experience with the APA parallels that with the Constitution"); Alan B. Morrison, The Administrative Procedure Act: A Living and Responsive Law, 72 VA. L. REV. 253, 253 (1986) ("My thesis is a simple one: the APA is more like a constitution than a statute."). Justice Scalia remarked in 1978 that it was "obvious even to the obtuse . . . that the Supreme Court regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process." Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345, 363.
to employ formal procedures but leaves it to those actors to determine precisely what kind.

Elsewhere, the Bill of Rights (plus a few lines of the Fourteenth Amendment) frames another proceduralist constitution: the constitution of criminal procedure. Like the administrative constitution, the criminal procedure constitution is transsubstantive, cutting across different types and severities of crimes. Here, again, legislative and executive actors are free to supplement the constitutional floor with substance-specific (or transsubstantive) procedures of their own design. But unlike the administrative constitution, the judicially interpreted floors of the criminal procedure constitution are detailed and demanding in a way that tends to stifle substance-specific supplementation. In many places, the criminal procedure constitution “occupies the field”—picture a high procedural plateau, not a valley. The resulting landscape is more even, comprising a basically uniform code of judge-written procedural rules applicable to rape, fraud, and drug possession alike.

Here, too, agency actors (prosecutors) are accorded remarkably wide discretion to “adjudicate” cases — through plea bargaining. This adjudication is the norm for criminal justice, leading to roughly ninety-five percent of all convictions. Unlike agency action under the administrative constitution, however, plea bargaining need not survive “reasonableness” review. And in contrast to the administrative setting, when courts overturn executive action in the criminal context, they typically do so through top-down, process-imposing rules that require specific actors to do (or not to do) very specific things. (Think Miranda.)

The administrative and criminal procedure constitutions support two procedural topographies so dissimilar they might have evolved on

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7 See Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117, 2120 (1998) ("[F]or most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode."); see also Panel Discussion: The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator, 26 FORDHAM URB. L.J. 679, 684 (1999) [hereinafter Panel] ("Prosecutors are the judges. They decide who is guilty. . . . Who sentences? . . . [T]he prosecutor . . .") (comments of then-Professor Gerard E. Lynch).


different planets, yet they coexist on the very same map of American law. Drawing inspiration from comparative constitutionalism, this Note contrasts these two procedural constitutions along three major axes, confronting three far-reaching questions. First, when should procedure be transsubstantive and when substance-specific? Does it make sense that the FTC and the EPA follow different procedures whereas homicide and fraud are governed by the same rules? Second, what is the proper level of judicial review of agency action? Does reasonableness review get it right, and if so, should courts review plea bargains — the criminal justice analog to administrative adjudication — for reasonableness? Third, when courts do regulate process, how should they do so? What are the advantages and disadvantages of process-imposing rules like Miranda relative to process-generating rules like Mead?

Comparative constitutional scholars teach that "[c]omparison is at the center of all serious inquiry and learning." They milk that insight, however, largely at the transnational level. This Note suggests the potential of domesticating comparative constitutionalism, in what might be called "comparative domestic constitutionalism." Although all comparative endeavors are vulnerable to the objection that contextual differences render the comparisons irrelevant, comparison here is indeed fruitful because, in many senses, criminal law is administrative law. The typical criminal case is "adjudicated" not by a court, but by an agency actor: the prosecutor. "Agencies" rule over corrections and sentencing as well. Recent scholarship capitalizing on this relationship peppers the field of criminal procedure.

10 At first blush, plea bargains, which hinge on at least nominal acceptance by defendants, appear more analogous to agency-negotiated settlements than to adjudications. Yet in the typical case, prosecutors alone possess the power to set the terms of the deal. For this reason, "the images conjured by the verb 'to bargain' are somewhat misleading." Lynch, supra note 7, at 2132. Furthermore, the subset of plea bargains in which defendants would wish to invoke reasonableness review to undo the terms of their pleas looks the least like negotiated settlements and the most like adjudications.


12 See id. at 2–3.

13 See Rachel E. Barkow, Administering Crime, 52 UCLA L. REV. 715, 721–22 (2005) (describing the role of agencies in criminal justice and calling prosecutors "the classic enforcement agency").

14 See, e.g., Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 STAN. L. REV. 989 (2006); Lynch, supra note 7; Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. REV. 757 (1999); Matthew C. Stephenson, Bureaucratic Decision Costs and Endogenous Agency Expertise 21–22 (Apr. 4, 2006) (unpublished manuscript, on file with the Harvard Law School Library). The progenitor of this scholarship, by popular account, was Professor Kenneth Culp Davis. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (Illini Books 1971) (1969). Yet even before Professor Davis, Professor Sanford Kadish noted that "the correctional agency is not sui generis, but another administrative agency
While this Note is in large part descriptive and comparative, its normative focus is on criminal procedure and what that field might learn from the administrative constitution. Borrowing again from comparative constitutional scholars, this Note supposes that the principal benefit of comparative work is its capacity to reveal the presuppositions that drive generally unquestioned "domestic" constitutional norms. By comparison to the administrative constitution, then, this Note aspires to challenge criminal procedure's norms of judicially imposed transsubstantivity, a hands-off approach to plea bargaining, and the imposition, rather than generation, of process. Given its ambitious goal and limited space, the Note paints constitutional landscapes with the widest of brushes, obscuring doctrinal quirks in the hope of probing deeper. Driving this approach is a belief that reform in criminal procedure will come not from tweaking this particular conduct rule or that, but from shifting the bedrock that supports the entire edifice.

II. SUBSTANCE-SPECIFIC PROCEDURAL REGULATION

A tour of the administrative state reveals different procedural law at each stop. The EPA, for example, publishes reports by a Scientific Review Committee and the National Academy of Sciences before promulgating rules. And the FTC accompanies its rules with a statement of economic effect, including the impact on small businesses and consumers. The connection between agencies and particular substantive themes thus implies that administrative procedure is, in large part, substance-specific. Moreover, even within one substantive domain, agencies are free to streamline procedures when a particular case presents good cause, meaning that administrative procedure is often not only substance-specific, but also case-specific.

Substance-specific procedural regulation — especially that crafted by agencies themselves — generates a number of interrelated benefits. First, almost tautologically, substance-specific procedures may be tailored to the particular subject matter under investigation, increasing efficacy. Complex scientific or technical matters, for example, might call for sequential procedures, each with its own set of reviews and
checks, or for broader and more detailed notice rules, so that the relevant scientific community can participate and correct any policy errors. Volatile decisions in which mistakes threaten tremendous social costs may warrant unusually extensive procedures as well.\(^\text{20}\)

Second, substance-specific regimes conduce to efficient resource allocation.\(^\text{21}\) For example, broadcast regulation is relatively open-ended, and the FCC may benefit from receiving diverse public views before publishing a proposed rule. But for the Atomic Energy Commission, processing such input might burn valuable resources better spent buying expertise.\(^\text{22}\) Requiring both agencies to observe the same procedures would be wasteful. And the same effect replicates itself within a single agency’s range of affairs. The D.C. Circuit recognized as much when it excused the EPA from formal, trial-type procedures for matters in which the factual issues “relate[d] almost entirely to technical (or policy) matters” that . . . ‘[could] just as easily (perhaps more effectively) be resolved through analysis of the administrative record and . . . statements of the parties.’\(^\text{23}\)

Third, substance-specific procedural regulation increases fairness by providing interested parties the opportunity to voice their concerns effectively given the substantive issues at play.

Despite these significant upsides, substance specificity in administrative law was far from inevitable. Indeed, there was a time when it looked as though procedural regulation in the administrative system was becoming increasingly transsubstantive, as courts reviewing agency decisions imposed whatever procedures they felt were necessary for a “fair” proceeding.\(^\text{24}\) In effect, these judicial decisions flooded the procedural valley, submerging certain agency-specific procedural hills and leaving others with only their peaks exposed.

In 1978, the Supreme Court intervened and drained the valley. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,\(^\text{25}\) the Court unanimously barred judges from supplementing APA-mandated rulemaking procedures with devices of their

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\(^{21}\) See id. at 1826, 1828.

\(^{22}\) For an insightful discussion of the impact of regulatory enactment costs on agency investment in expertise, see Stephenson, supra note 14.


\(^{24}\) See Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487, 1488 (1983) (“During the 1960’s and 1970’s, the courts . . . wr[ote] a detailed, judge-made code of administrative procedure for rulemaking.”); see also Scalia, supra note 2, at 348–52 (recounting the history leading up to *Vermont Yankee*).

own creation.\(^{26}\) "Agencies are free to grant additional procedural rights," the Court admonished, "but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."\(^{27}\) The Court’s decision was rooted in notions of procedural substance specificity. The Court quoted legislative history calling the APA "an outline of minimum essential rights and procedures" (in other words, merely a valley).\(^{28}\) It was up to the agencies to determine "when extra procedural devices should be employed" beyond this minimum.\(^{29}\) Allowing courts to demand additional procedures, the Court feared, would sanction an undesirable uniformity of procedure because agencies "would undoubtedly adopt full adjudicatory procedures in every instance."\(^{30}\)

The better idea, and Congress’s original plan, was to have agencies craft procedural rules optimized around their internal organization and the nature of the area they were charged with regulating. Congress had determined "that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved."\(^{31}\) Consequently, "the agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence.'"\(^{32}\)

*Vermont Yankee* has sometimes been honored in the breach,\(^{33}\) but it nevertheless continues to exert tremendous force over the trajectory of contemporary administrative law. Crucially, however, there is no *Vermont Yankee* of criminal procedure — there is nothing in criminal procedure keeping courts from turning a constitutional valley into a plateau, creating the very uniformity administrative law fought to escape.


\(^{27}\) *Vermont Yankee*, 435 U.S. at 524 (emphases added).

\(^{28}\) Id. at 546 (quoting H.R. REP. NO. 79-1980, at 16 (1946)).

\(^{29}\) Id.

\(^{30}\) Id. at 547; see also Scalia, supra note 2, at 386 ("The APA did not envision a rigid uniformity, but left it to each agency to adopt whatever procedures above the established minimum seemed desirable for its programs.").


Indeed, criminal procedure today is largely transsubstantive. With only a few exceptions, such as rape shield laws, the bulk of criminal procedure applies identically to crimes of every ilk.

But given substance specificity’s benefits, how did criminal procedure evolve into a system so transsubstantive? A grossly simplified historical account might go like this: The Warren Court’s criminal procedure innovations enforced the provisions of the Constitution through blanket conduct rules applicable across the board. The Court’s new commands were detailed and demanding—a high floor more like a plateau than a valley. States that were experimenting with criminal procedure regulation — and there were many such states — were pushed out of the field, along with any substance-specific regulations they had fashioned or intended to fashion. State regulations were no longer cost-effective when piled atop the Warren Court’s already demanding requirements. So, for the most part, legislatures stopped innovating and stopped regulating, leaving the Court’s detailed transsubstantive rules to reign supreme, as they still do today. In the criminal context, the law books are virtually devoid of substance-specific procedural regulation by legislatures and executive actors. The precise phenomenon the Vermont Yankee Court feared for administrative law — rigid uniformity — has come to dominate criminal procedure.

This transsubstantivity has real costs. For instance, the Fourth Amendment’s “reasonableness” requirement prescribes a balancing

34 See, e.g., FED. R. EVID. 412.
36 Miranda’s progeny are especially good examples. See, e.g., Berkemer v. McCarty, 468 U.S. 420, 441-42 (1984) (holding that arrests are custodial though traffic stops may not be); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (holding that questioning in a police station is not custodial if the suspect’s presence was voluntary).
37 Prior to Mapp, twenty-six states had adopted the exclusionary rule (eight since 1949, when the Supreme Court rejected it). Of these eight, four adopted the rule by statute, including one state that passed its statute a year after a judge had rejected the rule. Corinna Barrett Lain, Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution, 152 U. PA. L. REV. 1361, 1379–80 (2004). Localities were experimenting with regulation of police interrogation before Miranda, too. As Professor Lain reports, “[a]cross the country, police departments in a number of metropolitan areas — including Denver, Detroit, Minneapolis, and Philadelphia — had . . . begun warning suspects of their rights well before the Supreme Court forced them to do so.” Id. at 1411. The FBI gave warnings as well. Id.
38 Michigan, for example, had a substance-specific exclusionary rule prior to Mapp. See People v. Gonzales, 97 N.W.2d 16, 22 (Mich. 1959). Arizona employed a “murder scene exception” to the Fourth Amendment’s warrant requirement until Mincey v. Arizona, 437 U.S. 385, 395 (1978).
test, pitting citizens’ privacy interests against the government’s interest in ferreting out criminal activity. Within this balancing framework, different crimes give rise to different government interests. The social gains from seizing a murder weapon, for example, far outweigh those from seizing a few ounces of marijuana. One would think, then — given the balance — that the Fourth Amendment’s standards would be easier to satisfy in the murder case. But this is not so: the standard is identical regardless of the crime. As a result, if the standard is geared toward the murder case, it is far too lax for the marijuana case; if it gets the marijuana case right, it is too restrictive for a murder. Or, of course, it might be somewhere in between: too lax for marijuana and too strict for murder.40 Transsubstantivity is the root of this evil.

The transsubstantive Fourth Amendment spawns some perplexing results. First you get Mincey v. Arizona,41 in which homicide detectives arrived on the scene to smoking guns and bleeding bodies, including one wounded officer. After calling for medical assistance, the detectives conducted a long, thorough, warrantless search of the crime scene, Mincey’s apartment.42 The Supreme Court excluded all of the evidence the detectives found, concluding that the circumstances had not been exigent enough to justify the failure to obtain a warrant.43 The Court considered and rejected Arizona’s “murder scene exception” to the warrant requirement. “If the warrantless search of a homicide scene is reasonable,” the Court asked rhetorically, “why not the warrantless search of the scene of a rape, a robbery, or a burglary?”44 The easy answer: homicide gives rise to greater government interests.

But you also get Illinois v. McArthur,45 in which transsubstantivity pushed the Court to the other extreme. There, officers prevented McArthur from entering his own home for two hours while they obtained a search warrant to look for contraband inside. The contraband? A pipe, a box, and less than 2.5 grams of marijuana — totaling two misdemeanor charges.46 The Supreme Court rejected McArthur’s argument that the minor nature of his offenses called into question the reasonableness of the government’s seizure.47 While reasonable people could disagree, it seems plausible that both Mincey and McArthur

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41 437 U.S. 385.
42 Id. at 388-89.
43 See id. at 394-95.
44 Id. at 393. Ironically, the Court issued Mincey — explicitly rejecting a state’s transsubstantive approach — within three months of issuing Vermont Yankee.
46 Id. at 329.
47 See id. at 335-36.
were wrongly decided. Some offenses are simply worse than others, and the permissible privacy infringements in investigating crimes should track the differences among them.

A particularly unpalatable implication of Fourth Amendment transsubstantivity is that it encourages the Court to condone for all investigations tactics necessary only for some. For example, few would dispute that undercover police work is essential to successful enforcement of drug laws. Buy-and-busts — in which an undercover officer buys drugs from a suspect, then immediately arrests him — are indispensable to the arrest and prosecution of drug dealers. Were the Court to forbid undercover tactics altogether, this valuable technique for enforcement would, obviously, be thwarted. So the Court permits them; transsubstantivity means it permits them everywhere. We then get undercover tactics that are a lot harder to swallow, such as when agents pose as coworkers, friends, or even lovers, creating entire human relationships built on dust.

Try the Fifth Amendment’s Self-Incrimination Clause next. Unlike the Fourth Amendment, the Self-Incrimination Clause does not employ a reasonableness test that balances government and private interests — it is rather a promise that “[n]o person . . . shall be compelled . . . to be a witness against himself.” But a transsubstantive interpretation does not fulfill this promise equally for different kinds of defendants. Applying Miranda’s strict conduct rules to terrorism cases, for example, yields untenable results (and doubtless discourages the government from bringing criminal charges in the first place). Sophisticated terror suspects can hide behind Miranda’s protection, closing their lips around information vital to national security. Analogous problems inhere more broadly, stemming from differences not only among crimes, but also among criminals. Defendants in drug cases, for example, are mostly repeat offenders, experienced in the system; rape defendants, in contrast, often have clean records and probably enter interrogations in a more emotionally vulnerable state. For the former, Miranda is a fortress; for the latter, it is a flimsy shield, if anything at

48 Atwater v. City of Lago Vista, 532 U.S. 318 (2001), in which the Court rebuffed the argument that custodial arrest was unreasonable for nonjailable offenses, see id. at 346–49, may suffer the same ailments.


50 See William J. Stuntz, Race, Class, and Drugs, 98 COLUM. L. REV. 1795, 1820–21 (1998).

51 See id. at 1820.


53 U.S. CONST. amend. V.

54 For example, Miranda forbids the police from questioning a suspect after he requests a lawyer. See Minnick v. Mississippi, 498 U.S. 146, 156 (1990).

55 See 2003 SOURCEBOOK, supra note 8, at 454 tbl.5.53.
Transsubstantive regulation means that to hand over the shield, courts must also build the fortress.

Sixth Amendment ineffective assistance cases also reveal transsubstantivity’s flaws. On a basic level, defendants with more at stake probably deserve more effective representation. But attention should be paid as well to the nature and complexity of the trial that a given crime necessitates. Compare United States v. Cronic and Strickland v. Washington, two seminal ineffective assistance cases handed down the same day in 1984. David Leroy Washington’s life hung in the balance after he pled guilty to a trio of capital murder charges against the advice of his lawyer. At Washington’s sentencing hearing, his lawyer made the strategic decision to rely solely on the plea colloquy and thus to forego presentation of further mitigating evidence. The trial judge sentenced Washington to death. The Supreme Court upheld Washington’s sentence, finding his lawyer’s efforts at sentencing neither objectively unreasonable nor unduly prejudicial.

Harrison Cronic, by contrast, stood trial for mail fraud. (Perhaps surprisingly, many fraud defendants cannot afford good lawyers and face nonnegligible time behind bars for their misdeeds.) His attorney had only twenty-five days to prepare for a four-day jury trial that commanded over four years of government preparation, including thousands of pages of document review. Cronic’s lawyer, no matter how skilled or sincere, could not conceivably have unraveled the government’s case. And unlike in Strickland, strategic inaction in Cronic was not a possibility. Sure enough, Cronic was convicted and sen-

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56 Professor Louis Seidman argues that Miranda makes vulnerable suspects worse off by immunizing Miranda-compliant police interrogations. Louis Michael Seidman, Brown and Miranda, 80 CAL. L. REV. 673, 744–46 (1992); see also William J. Stuntz, Miranda’s Mistake, 99 MICH. L. REV. 975, 977 (2001) (“Because of Miranda, sophisticated suspects have a right to be free from questioning altogether — not simply free from coercive questioning — while unsophisticated suspects have very nearly no protection at all. The first group receives more than it deserves, while the second receives less than it needs.”). One study found that suspects with felony records were three to four times more likely to invoke Miranda rights than those with clean or misdemeanor records. See Richard A. Leo, Inside the Interrogation Room, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996).


59 Id. at 672–73. Although the failure to seek out mitigating evidence would be unreasonable in the vast majority of cases, it made some sense in Strickland, for it prevented the prosecution from cross-examining Washington and putting forth rebuttal evidence. See id. at 673.

60 Id. at 675.

61 See id. at 698–99.

62 According to one study, although white-collar criminals have assets that surpass those of common criminals, on average their liabilities surpass those assets. See DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES 63 tbl.3.3, 65 & n.19 (1991). Perpetrators of mail fraud tend to have particularly unimpressive finances. See id. at 50–51 & tbl.3.1, 57–59.

63 See 2003 SOURCEBOOK, supra note 8, at 458 tbl.5.60.

tenced to twenty-five years in prison. After condoning the performance of Washington's attorney, however — who barely lifted a finger — the Court could not possibly rebuke Cronic's. The Court's trans-substantive mindset forced it to tie the standard for fraud defense to that for capital sentencing defense (and, likely, capital sentencing defense to larceny defense, or something similarly run-of-the-mill). But fraud, capital sentencing, and larceny cases are nothing alike; fraud cases are the most complex by far, and the resources needed to defend a larceny charge would hardly make a dent in a complex fraud case like Cronic's. Unsurprisingly, fewer defendants opt for trial in fraud cases than for virtually any other felony. Indigent fraud defendants have almost no shot at effective assistance of counsel in a trans-substantive world.

Criminal procedure could be otherwise. A shift toward substance-specific procedural regulation could happen in either of two ways. First, the Supreme Court itself could craft substance-specific rules in its opinions. Against the greater tide of transsubstantivity, the Court has done so on occasion, and the sky has not fallen. But a better solution, for institutional reasons discussed in greater depth below, might be for the Court to retreat strategically, giving room for legislative and executive actors to regulate procedure. These institutions, of course, would be free, and should be encouraged, to regulate in a substance-specific manner. The Court would retain the ultimate respon-

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65 Id. at 650.
66 The Strickland/Cronic example suggests that fraud cases, on average, probably require more time and specialized knowledge than capital sentencing cases do. This observation, however, is not at all intended to dull the argument that capital cases, too, should require a heightened standard of effective representation. See, e.g., Strickland, 466 U.S. at 715–17 (Marshall, J., dissenting). Indeed, the capital/noncapital distinction only furthers the substance specificity thesis this Part advances. The Court's refusal to recognize expressly the significance of the capital/noncapital divide has contributed to its warped, ad hoc ineffective assistance doctrine. See Rompilla v. Beard, 125 S. Ct. 2456, 2471 (2005) (Kennedy, J., dissenting). Some states have recognized that capital cases call for especially effective counsel. See, e.g., Amadeo v. State, 384 S.E.2d 181, 182 (Ga. 1989).
68 See, e.g., Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) (rejecting an exigent circumstances justification for a house search related to a noncriminal traffic violation); Terry v. Ohio, 392 U.S. 1, 30 (1968) (limiting the legality of stop-and-frisks to situations in which the police reasonably suspect that a target has committed or is about to commit a crime associated with the use of weapons). Justice Breyer recently advocated a substance-specific rule that considers domestic abuse. See Georgia v. Randolph, 126 S. Ct. 1515, 1529 (2006) (Breyer, J., concurring) (arguing that, despite the general rule the majority opinion established, consent by a possible victim of domestic abuse should render a home search reasonable over the objection of the victim's partner).
69 See infra pp. 2548–49.
70 Evidence suggests that in spaces Supreme Court jurisprudence has not occupied, other actors have regulated in a substance-specific fashion. Compare, e.g., Murray v. Giarratano, 492 U.S. 1, 7–10 (1989) (denying a right to counsel for habeas proceedings, even in a capital case), with 21
sibility for passing on the constitutional adequacy of the solutions devised, which would undoubtedly generate its own challenges. But the Court would be better situated to surmount these new obstacles than to cut procedural rules from whole cloth as it does today.71

The greatest vulnerability of a substance-specific scheme is its complexity. Lawyers and police would have to learn multiple sets of procedures, a burden that would fall most heavily on police, who lack the time to categorize each incident they confront and select the proper protocol from the shelf. But this objection, however strong it sounds, is exaggerated. Similar crimes could be grouped together, creating a small number of procedural categories. And again, the little bit of substance-specific procedural law we currently have — such as a few Fourth Amendment rules — suggests that street police can handle some complexity.72 Lawyers and detectives, who make their decisions in relative calm, should encounter even fewer problems. On top of that, police departments, prosecutors’ offices, and defense bars might specialize (many already do), forming substance-specific subunits organized around the relevant procedural law. A fear of complexity should not stand in the way of substance specificity’s great benefits.

III. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

A second line between the administrative and criminal procedure constitutions concerns judicial review of agency action. The administrative constitution entrusts agencies with ponderous legislative and judicial responsibilities. When executing these charges, agencies are guided by the administrative constitution’s structural and procedural protections73 and are subject to reasonableness review in the courts. This review entails a relatively searching examination of the agency’s reasoning process to ensure that the agency did not draw its conclusions in an “arbitrary or capricious” manner.74 Courts investigate whether the agency considered the relevant factors and ignored irrelevant ones.75 They check the agency’s resolution against agency prece-
dent and inspect the record for evidence sufficient to support the agency’s conclusion. If the record contains serious objections, the agency must offer good reasons for rejecting those arguments.

For a standard rooted in the seemingly deferential words “arbitrary or capricious,” this review, often called “hard look” review, can have serious bite. In State Farm, for example — the seminal hard look case — the Supreme Court invalidated the federal government’s decision to eliminate passive restraint rules for automobiles. Before rescinding the passive restraint rule, the agency received comments, held public hearings, and concluded that the passive restraint requirement would not produce significant safety benefits. The Supreme Court overturned the agency’s action for failing to consider policy alternatives, such as mandatory airbags, that were within the ambit of the existing regulatory standard.

Of course, hard look review does not escape controversy. Administrative law scholars perpetually bat about allegations that the practice has ossified administrative procedure and is repugnant to the spirit, if not the letter, of Vermont Yankee. But despite the uproar, the Supreme Court has not backed down, perhaps recognizing that much of the legitimacy of the administrative state rests on the shoulders of careful judicial review. Hard look review strikes a balance between administrative expediency and the liberties protected by Articles I and III of the Constitution. The government may arrange its affairs to act expeditiously, but never irrationally.

In the criminal context, the balance shifts dramatically toward expediency. Judicial review of administrative action in criminal law — review of plea bargains, specifically — bears no resemblance to hard

76 GELLHORN & LEVIN, supra note 33, at 97; Cass R. Sunstein, Deregulation and the Hard-Look Doctrine, 1983 SUP. CT. REV. 177, 182.
77 State Farm, 463 U.S. at 43-44.
78 See Sunstein, supra note 76, at 182.
79 See 463 U.S. at 46.
80 Id. at 38.
82 See, e.g., Richard J. Pierce, Jr., Seven Ways To Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 67 (1995) (“The judicially enforced duty to engage in reasoned decisionmaking is the largest single source of judicial ossification of the rulemaking process . . . .”); see also Carl McGowan, Reflections on Rulemaking Review, 53 TUL. L. REV. 681, 689 (1979) (opining that combining Vermont Yankee’s restrained procedural review with searching substantive review “presents all the elements of paradox”).
83 See Barkow, supra note 14, at 1023 (asserting that judicial review has played a major role in “the Court’s acceptance of broad delegations of legislative and judicial power to executive agencies”); Sunstein, supra note 81, at 525 (observing that “the basic function of the courts might be described as the promotion of ‘legitimacy’ in the administrative process”).
look review. Courts overseeing the plea process glance merely to see whether the plea was knowing, voluntary, and grounded in a factual basis. That a plea was offered solely to avoid the death penalty, and amid protestations of innocence, does not suffice to invalidate it. Prosecutors are free to threaten any legal sanction, change course from case to case, and reject defendants' offers and arguments for no reason at all (or worse, for illegitimate reasons). And defendants have no discovery rights to assess the evidence against them before pleading. The only meaningful review of a prosecutor's "adjudication" of guilt comes when a defendant rolls the dice and insists on trial. But because trials carry the risk of harsher punishment, pressure to plead guilty can be tremendous, even for innocent defendants.

Of course, plea bargaining in practice may not be so haphazard as this alarming description makes it sound. Judge Gerard Lynch describes a "common law" of plea bargaining in which prosecutors are guided by a combination of formal office policy, precedent, and a desire for equity among similarly situated defendants. But as Judge Lynch also points out, this common law is informal and unpublished, which has two major ramifications. It advantages defendants represented by "insider" counsel who are in the know. Only these attorneys will understand enough about prosecutors' precedents and polit-

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84 Barkow, supra note 14, at 1026 (concluding that prosecutors "face only a cursory judicial inquiry" rather than "being subject to the hard-look review that other agencies face"). Hard look review inspects the agency's reasoning process; plea bargains face no such review. Indeed, the prosecutor "[m]ost commonly . . . simply accepts the results of the police investigation." Lynch, supra note 7, at 2124. The criminal justice system also lacks the political safeguards that help check administrative agency abuse. See Barkow, supra note 14, at 1028–31. But see Richman, supra note 14 (arguing that Congress delicately considers prosecutorial accountability when delegating criminal enforcement authority).

85 See FED. R. CRIM. P. 11(b). Judge Lynch has painted the plea review process as "a five-minute interview of the person, under Rule 11, getting a kind of half-hearted, scripted confession as part of the guilty plea process." Panel, supra note 7, at 684 (footnote omitted).


87 Of course, the prosecutor may not reject a defendant's argument for reasons such as racial prejudice, but masking prejudice is simple. See Lynch, supra note 7, at 2129; see also Barkow, supra note 14, at 1027 ("Prosecutors need not treat similar cases similarly . . . , and they need not explain why they agreed to reach a deal with one defendant, but refused to do so with another defendant guilty of the same crime."). Some empirical studies have revealed massive discrepancies in the bargains offered to white and nonwhite defendants. See LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 14–16 (2000), available at http://www.civilrights.org/publications/reports/cj/justice.pdf. Even the most informal adjudication under the administrative constitution, by contrast, requires a written statement of the basis for denial of a claim. See 5 U.S.C. § 555(e) (2000).

88 See United States v. Ruiz, 536 U.S. 622, 629 (2002) (suggesting that the defendant's right to access evidence against him is distinctly a trial right).

89 Barkow, supra note 14, at 1034; see also Lynch, supra note 7, at 2146.

90 See Lynch, supra note 7, at 2131–32.
cies to demand fair treatment. It also fails to carry the force of law. Although prosecutors may follow past policy, defendants have no recourse aside from trial should their prosecutor diverge. The prosecutor’s commitment to fairness is a slender reed for defendants to grasp.

Try selling the defendant in Bordenkircher v. Hayes,92 for example, on the protections of plea bargaining’s common law. Hayes’s misdeed was forging a check for $88.30, an offense punishable by two to ten years’ imprisonment under Kentucky law. The prosecutor offered a five-year sentence if Hayes pled guilty; if not, he threatened to reindict Hayes under Kentucky’s three-strikes law, subjecting him to a potential mandatory life sentence. Hayes rejected the five-year deal; he was convicted at trial and dealt the life sentence he had been promised.93 Hayes argued that the reindictment violated the Constitution’s ban on vindictive prosecution.94 The Supreme Court rebuffed this argument, reasoning that because the prosecutor’s threat was legal — because Hayes was plainly eligible for prosecution under the three-strikes law — no foul had been committed.95

How might Hayes’s case have looked different under § 706 — under the administrative, rather than the criminal procedure, constitution?96 If the prosecutor had been, for example, an agent of the SEC? For one thing, reasonableness review would have applied. The Court would have inquired whether the threat against Hayes was consistent with agency precedent — that is, whether the prosecutor had actually exacted the threatened penalty in similar cases. (Mandatory data collection and, possibly, “sentencing guidelines” for pleas would help guide this inquiry.) The Court would also have considered whether the prosecutor’s decision was based on irrelevant factors, such as prejudice. If Hayes had offered to plead guilty for a sentence lighter than five years, the Court would have asked whether the prosecutor typically accepted such offers and, if so, why he rejected Hayes’s.97

93 Id. at 358–59.
94 See id. at 360.
95 Id. at 364–65. One discomfort with the result in Bordenkircher relates to an anticoercion principle the Supreme Court espoused in Ex parte Young, 209 U.S. 123 (1908): “A law which indirectly [prevents judicial review] by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is . . . unconstitutional.” Id. at 147.
96 A paradigm shift toward the administrative approach could occur in two ways. Congress and state legislatures could pass legislation subjecting plea bargains to something resembling arbitrary and capricious review, or courts could read the Due Process Clauses, which have long been understood to prohibit arbitrary government behavior, as requiring the same scrutiny.
97 To be sure, a determined prosecutor could probably justify almost any legally authorized outcome. Presumably, however, extreme or unusual bargains would demand more compelling justifications to pass muster. In this sense, hard look review might make the most sense under a signaling theory: the prosecutor’s willingness to expend the resources necessary to produce a de-
After all of these inquiries, the Court still might have found the bargain constitutionally spotless — and that would be fine. Reasonableness review, after all, is not a backdoor attempt to undermine the system of plea bargaining, just as hard look review scarcely paralyzes administrative agency action. Some agencies, in fact, conduct upwards of 10,000 informal adjudications per year subject to reasonableness review. Most orders from these agencies contain little or no explanation; detailed justifications are provided only in response to challenges. Prosecutors might function similarly. Reasonableness review, at bottom, simply strives to maintain the legitimacy of a system in which the executive dominates cases and controversies from start to finish and to enforce basic due process principles of equal treatment, nonarbitrary government action, and a general allergy to coercion.

IV. PROCESS-GENERATING PROCEDURAL RULES

An argument about the quantity or level of constitutional regulation, such as the one tendered in Part III, says nothing about the quality or nature of that regulation. Traversing this ground begins with Vermont Yankee, which forbade courts from imposing procedural requirements that go beyond the dictates of the APA. In large part, Vermont Yankee took courts out of the business of writing administrative procedure, leaving such regulation to legislatures and agencies. But Vermont Yankee does not mean that courts never issue opinions that impact administrative procedure — they do. When they do, they tend to use process-generating rules — rules encouraging other government bodies to attend to formal process but not dictating the use of particular procedural devices. Courts regulating criminal procedure, by contrast, have wielded an arsenal of process-imposing rules, which demand that specific actors undertake or refrain from certain actions. This distinction between the types of procedural rules courts employ tailed justification would signal that the benefits of the unusual bargain are high. See generally Matthew C. Stephenson, A Costly Signaling Theory of Hard Look Review (John M. Olin Ctr. for Law, Econ. & Bus., Harvard Law Sch., Discussion Paper No. 539, 2006), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/Stephenson_539.pdf.


100 Defendants would raise reasonableness challenges along with extant claims on appeal or in a habeas petition. Reasonableness review would thus burden the criminal process little more than the addition of any other substantive right giving rise to a cognizable claim.

101 See Sunstein, supra note 81, at 525.
forms a third basis for comparing the administrative and criminal procedure constitutions.

Three examples illustrate the pattern of process-generating rules in administrative law. The first is *Mead*. *Mead* is a refinement of *Chevron*,\(^{102}\) which established the rule that courts defer to reasonable agency interpretations of law when Congress has not directly answered the precise question at issue.\(^{103}\) *Mead* honed *Chevron* by identifying a class of cases in which this deference does not obtain. After *Mead*, deference typically applies only when Congress has delegated authority to the agency to make rules carrying the force of law and the agency interpretation at issue was promulgated in the exercise of that authority.\(^{104}\) As a general rule — and here is the connection to process — the force of law adheres when agencies employ formal procedures.\(^{105}\) The Court in *Mead* never told agencies what procedural devices to use, so *Mead*’s rule does not contravene *Vermont Yankee*. Nor did the Court require formal process at all. But by tying *Chevron* deference to the use of formal procedures, the Court created a powerful incentive for formality.\(^{106}\) *Mead* encourages Congress to attend to formal procedures by incentivizing Congress to grant agencies the power to act with the force of law; it reaches agencies, too, by hinging interpretive deference on their decision to wield that power.

Nondelegation doctrine provides a second instance of judicially authored process-generating rules in administrative law. In *A.L.A. Schechter Poultry Corp. v. United States*,\(^{107}\) the Supreme Court struck down a provision of the National Industrial Recovery Act that delegated to the President power to promulgate codes to regulate unfair competition. Crucial to the Court’s decision was the Act’s failure to provide for administrative procedures by which the President was to carry out his delegated authority.\(^{108}\) Procedural defects also plagued the regulations challenged successfully in *Panama Refining Co. v.*


\(^{103}\) See id. at 842–44.

\(^{104}\) See *Mead*, 533 U.S. at 229–30.

\(^{105}\) See id. at 230 (“Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”); see also David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 211 (asserting that the “chief” factor for a court deciding whether to defer to an agency interpretation is “the degree of procedural formality involved in the action”).

\(^{106}\) See Barron & Kagan, supra note 105, at 203 (asserting that *Mead* established a “preference for formality”). *Skidmore* deference — the type of deference an agency gets when it fails to qualify for *Chevron* treatment — varies directly with formal process as well. See *Mead*, 533 U.S. at 228.

\(^{107}\) 295 U.S. 495 (1935).

\(^{108}\) See id. at 533.
Ryan\textsuperscript{109} that same year and \textit{Carter v. Carter Coal Co.}\textsuperscript{110} the next.\textsuperscript{111} These decisions, basically the Court's last words in nondelegation, continue to provide Congress with incentives to prescribe at least a framework of procedures for agencies to follow in the exercise of delegated power. Again, the Court did not command any particular procedures or even any specific level of process. It simply provided incentives for process and left the details to the decisionmakers closer to the ground.

A final example is hard look review, which also affects agency procedure through rules that are process-generating rather than process-imposing. Courts conducting hard look review permit agencies to proceed undisturbed as long as their decisionmaking processes are reasonable. This practice provides incentives for agencies to implement whatever procedures will produce a sufficient record for review.\textsuperscript{112} Some agencies, for example, may write opinions explaining the rationale behind their decisions.\textsuperscript{113} Other agencies are free to handle the matter differently.

Judicial regulation of criminal procedure reads from a different book. A prolix code of judge-written rules directly regulates most facets of the criminal process. Fourth and Fifth Amendment law are two of the densest examples, prescribing "constitutional standards so extensive and intricate that they rival even the Internal Revenue Code."\textsuperscript{114} Treatises containing criminal procedure's process-imposing rules are volumes long, spanning an array of matters such as police interrogation, waiver of rights, jury selection, ineffective assistance of counsel, and double jeopardy. Simply put, constitutional criminal procedure, where it regulates, "occupies the field."\textsuperscript{115}

This intricate judicial imposition of process inflicts a number of painful injuries on the criminal justice system. For one, detailed regu-
lation of conduct (and the litigation such regulation engenders) shifts focus from ends to means, both rhetorically and empirically. An important end of the criminal justice system is producing just outcomes — in particular, innocent people should never be punished. A particular procedural device — such as the Fifth Amendment or the myriad rules that implement it — is arguably a means to achieve just outcomes, not an end itself. But because the criminal procedure constitution says so much about conduct and so little about outcomes and incentives, rhetoric about “enforcing the Constitution” has become synonymous with a fixation on means — for example, on Miranda violations. Criminal litigation, too, bears out the means-ends problem at more than a rhetorical level. Defense attorneys strapped for resources substitute procedural claims for merits claims, the latter being much more costly to prepare. Process imposition encourages this dynamic by filling defense counsel’s plate with virtually limitless procedural selections. At bottom, the judicial focus on conduct distracts from unjust outcomes.

Process imposition also changes the identity of the primary procedural regulator. Whereas the political branches decide day-to-day procedural issues in process-generating regimes, judges make the calls in process-imposing ones. But having judges enforce detailed conduct rules against their political counterparts is a recipe for rotten politics; at some point, judicial implementation of a code of decorum for political actors is simply too intrusive. Professor Clark Byse, in an article lauding the Vermont Yankee decision for forbidding just this practice, argues the point for administrative law. “It is not . . . a proper recognition of the role and responsibility of administrative agencies,” Professor Byse suggests, “for the reviewing court to order the administrators to adopt a particular procedural device if the desideratum might be achieved by a less intrusive mechanism.” In addition to fostering resentment among the branches, this form of procedural lawmaking is inefficient. Moreover, process-imposing rules stifle innovation by

116 This sentiment inspired Judge Friendly’s influential article arguing that federal habeas review should focus on innocence, not on technical procedural violations. See Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. CHI. L. REV. 142, 142–43, 156–57 (1970); cf. Byse, supra note 20, at 1828 (making the means-end point for administrative procedure).

117 See Stuntz, supra note 6, at 40–45.

118 See id.

119 Byse, supra note 20, at 1828.

120 Id. (“By prescribing a particular procedure the court prevents the agency, which has the firstline responsibility and experience in administering the statute, from utilizing that experience to provide the needed record in the most cost-effective fashion.”); cf. Stuntz, supra note 39, at 827 (“Legislators know more about relevant policy alternatives than courts do. The goal of constitutional law should be to prompt elected officials to put that information to good use, not to have Supreme Court Justices choose among the policy alternatives themselves.”).
legislatures and agencies that, if left alone, might succeed in fashioning superior alternative procedures that achieve the desired ends.

In the criminal justice system, the effects of process imposition on constitutional politics are especially severe. Process-imposing rules are authored by the actors with the least information: appellate judges. Although judges are thought to be experts on procedure, they know little about crime rates and funding decisions, both indispensable considerations for informed regulation.\(^{121}\) And it gets worse. Through a sort of mischievous political dance, \("[j]udicially mandated procedures make legislators and prosecutors natural allies."\(^{122}\) By itself, this partnership sounds benign, but when it works to undermine the courts, it can be quite malignant. When legislatures disagree with court-imposed procedures, they help prosecutors avoid them by increasing sentences and broadening the substantive criminal code, giving prosecutors a daunting stack of chips to bring to the plea bargaining table.\(^{123}\) Defendants eye these chips and fold, and the courts' extensive conduct rules end up moot. Some of this might help explain why \("[i]n no other western society has the regulation of police and prosecutorial officials, as well as the functioning of the courts, been understood in comparable degree to be a function of judges."\(^{124}\)

Worse yet, intensive process imposition chokes off funding for policing and adjudication — the areas the criminal procedure constitution regulates most closely and, consequently, legislatures regulate least. Because legislatures do not like to spend where they cannot regulate, policing and adjudication get the short end of the stick.\(^{125}\) Legislatures prefer not to buy enforcement of rights they did not enact, so funding for public defenders suffers.\(^{126}\) The real money flows to corrections, where legislatures have plenty of room to regulate.\(^{127}\)

As with transsubstantivity and judicial review of plea bargains, criminal procedure need not be this way. Process-generating regulation of criminal procedure is possible. Courts could start by turning their process-imposing rules into default rules — rules that apply only

\(^{121}\) See Stuntz, supra note 6, at 4 ("[T]he law that defines what the criminal process looks like, the law that defines defendants' rights, is made by judges and Justices who have little information about crime rates and funding decisions, and whose incentives to take account of those factors may be perverse."); see also Francis A. Allen, Central Problems of American Criminal Justice, 75 MICH. L. REV. 813, 818 (1977); Allen, supra note 71, at 523.

\(^{122}\) Stuntz, supra note 39, at 803.

\(^{123}\) See id. ("Prosecutors treat laws defining crimes and sentences as bargaining chips, while legislators liberally supply the chips."); id. at 819.

\(^{124}\) Allen, supra note 71, at 523.

\(^{125}\) See Stuntz, supra note 39, at 810; see also id. at 811 ("Had Fourth and Fifth Amendment law left legislators more space to regulate, [funding] statistics might look very different.").

\(^{126}\) Stuntz, supra note 6, at 55.

\(^{127}\) Stuntz, supra note 39, at 809–10.
until legislatures craft alternative solutions. This move would shift the
locus of day-to-day regulation to political actors. Strickland's app-
roach to ineffective assistance, for example, might be jettisoned in fa-
vor of an incentive-based alternative. To remedy the funding prob-
lems that are largely responsible for ineffective assistance, courts could
ask legislatures to establish expert commissions to recommend appro-
priate funding schemes. In jurisdictions that complied and imple-
mented the commissions' recommendations, ineffective assistance doc-
trine would apply minimally; other jurisdictions would get a double dose. Legislatures would have strong incentives to fix
funding, but through a system that would make Justice Brandeis proud. As a bonus, legislatures would be free to craft substance-
specific solutions.

The reasonableness review of plea bargains that Part III suggests is
another example. A process-imposing approach to plea bargain review
might require prosecutors to recite certain warnings or refrain from
particular threats. Reasonableness review avoids this intrusion. Under a reasonableness regime, prosecutors — seeking to have their
bargains upheld — would devise procedures to demonstrate reason-
ableness to the courts. They might, for instance, write brief opinions
outlining the weight of the evidence, the context, and the defendant's
offers or arguments. Maintaining detailed plea and punishment data
would also help prosecutors justify bargains. It would be in prosecu-
tors' interests, not against them, to adhere to these procedures, which
would match their resources and organization. Furthermore, legisla-
tures — wanting to preserve an effective plea system, which saves sig-
nificant sums of money — would back these efforts at procedural
regulation rather than undermine them.

128 See Allen, supra note 71, at 541-42 (arguing that "the Court will not succeed in regulating the
criminal justice system] unless it stimulates a constructive response from the localities and the
other branches of government"); cf. Williams, supra note 10, at 454-55 (encouraging courts to re-
view agencies' decisions in a way that would "assure that issues are aired sufficiently for [courts]
to perform [their] function of substantive review, without impinging upon the ability of the agency
to select the procedural devices that appear most suitable in light of the substantive issues in-
volved and the agency's institutional capacities").

129 See Stuntz, supra note 39, at 837.

130 See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (ad-
vancing his laboratories-of-democracy understanding of federalism).

131 Cf. Williams, supra note 10, at 455-56 (discussing devices courts can use to "discipline[d] agency action without entangling it in elaborate procedures"). "Whether a court should ever mandate the use of any particular device," Professor Williams continues, "seems doubtful. But the courts... may demand that agencies develop a record that enables a reviewing court to find an intelligible answer for each substantial challenge posed. Under these judicial pressures, agencies should be able to work out the detailed procedures most suitable to each specific task." Id. at 456 (footnote omitted).
V. CONCLUSION: REDRAWING THE MAP

Transsubstantive procedural regulation, virtually limitless plea bargaining discretion, and judicial oversight through detailed process-imposing rules are characteristic landforms on the criminal procedure map. This Note seeks to reshape criminal procedure by comparing its landscape to the topography of the administrative constitution — the APA.

Countless stones have been left unturned. Under the administrative constitution, for example, agencies commonly promulgate rules that bind both themselves and the public. This practice enhances notice by informing the public of the actual bounds of enforceable regulation. It also reins in the discretion of law enforcers by making them commit publicly to pursuing certain types of violations. Substantial arguments can be marshaled for importing rulemaking practice into the criminal context.\(^\text{132}\)

Alignment with the administrative constitution does not demarcate the limits of viable criminal procedure reform. In some ways, criminal procedure might aspire to go further than administrative procedure. Consider hard look review, for example. Parts III and IV suggest that courts should review the plea bargaining process for reasonableness. It is important to note, however, that courts use hard look review in administrative law partly for second-best reasons: they lack the technical expertise necessary to delve into agencies' substantive and policy decisions.\(^\text{133}\) But courts reviewing a mountain of criminal cases probably do have the expertise necessary to determine which trial courts generate the most procedural errors or wrongful convictions. As a result, courts are in a position to threaten these jurisdictions with a harder look, heightening incentives for improved process.

The point of this Note is not that criminal procedure must look just like administrative procedure, though changes in that direction would make sense. Instead, it is more that criminal procedure need not look just like criminal procedure does today. This insight is what comparative constitutionalism seeks to demonstrate about the American Constitution when it compares the document to those of foreign nations. This is what comparative domestic constitutionalism, too, is all about.

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\(^{132}\) See Davis, supra note 14, at 80-84.

\(^{133}\) See Jordan, supra note 98, at 397-400.