The Administration of Genius: Expertise and the Patent Bargain

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Abstract: This Article investigates the role of the patent clerk in the nineteenth century development of the patent system to provide a new history of the foundational metaphor of the patent system, the “patent bargain.” The “patent bargain” refers to the exchange represented by each issued patent, in which the inventor reveals a novel idea in return for a limited-term monopoly to exploit that idea. Today, critiques of the patent system focus on whether the patent bargain is a good deal, that is, whether the economic interests of inventors and the public are served by issued patents. Drawing upon nineteenth-century patent manuals and regulations, the annual reports of the patent office, and case law and statutes, as well as the history of technology and of the early administrative state, this Article resituates the patent bargain as a metaphor explaining the actions of patent bureaucrats when deciding which applications to grant. In a series of nineteenth-century experiments with the operation of the patent system, Congress adopted different approaches to the deployment of expertise within the executive branch in order to best serve the public and private interests at stake in patent applications. Each experiment raised a storm of controversy about the definition and use of expertise within a democratic republic. Deciding what patent clerks ought to be doing required consideration not only of the public interest in patents, but also of the role of the administrative state. The ultimate resolution of these controversies about the administration of genius depended both on the transformation of the patent office into the first modern federal agency and the development of a consensus that the patent bargain appropriately described the task of these executive branch experts.