Defining the Judicial Office

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Every now and then, somebody in Congress introduces a bill that would restructure the federal courts in some way. The debates question whether Congress should restructure the lower courts, not whether it can. Even the opponents of the proposals, that is, assume Congress at least has constitutional power to enact them.

This seems to be what most everybody thinks. But I’m not sure most everybody is right. It seems to me quite possible that certain restructuring proposals might violate Article III of the Constitution. The Tenure Clause has no bearing on Congress’s choice of what the lower courts’ structure will look like, other than to say that their judges will have life tenure; but it may sometimes constrain Congress’s ability to tinker with the courts afterwards.

I want to explore two theses in this paper. The bigger, more important one is that there is good reason to think that Article III’s tenure provision is best read as limiting Congress’s authority to restructure the lower courts in certain circumstances: some measures may so change judges’ jobs that, even though the judges still maintain a position in the federal judiciary, they have effectively – and unconstitutionally – been taken out of the “Offices” to which they were originally appointed, and to which they are guaranteed good-behavior tenure by Article III.