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John Roberts, Legislator

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A new book tells of political horse-trading at the Supreme Court.

During a 10-day break for the Supreme Court in April 2012, several justices left Washington to give lectures or take short vacations. But both John Roberts and Anthony Kennedy remained in Washington, and Roberts used the time to try to win over Kennedy on Obamacare.

The court had heard arguments on the law a month earlier, and Kennedy had already told the other justices he considered it unconstitutional. He wanted to strike it down. Roberts had a different view, wanting to invalidate some of the law and keep other parts. During their conversations that April, the two of them talked through the substantive issues that the case involved, like the law's health insurance mandate, the cost of insurance premiums and so on.

This scene is part of Joan Biskupic's new biography of Roberts, "The Chief." The book contains a description of the justices's behind-the-scenes maneuverings on Obamacare that's more detailed than any other to appear so far.

It's an excellent case study of one of the biggest problems with today's Supreme Court.

Too often, it acts as a kind of super-empowered legislature. During their conversations, Roberts and Kennedy were often debating not legal questions but policy questions that are properly the purview of Congress. They were substituting their own political judgment for that of an elected legislature.

In the case of Obamacare, the outcome was less than disastrous. Roberts didn't persuade Kennedy. Yet Roberts's vote to uphold much of the law was enough. By a 5-4 margin, the court allowed millions of people to keep their health insurance. One part of Roberts's motivation was protecting the court's legitimacy, rather than invalidating a major new law.

But the process was flawed and unseemly, full of political horse-trading, as Biskupic describes. As a compromise, evidently intended to make Roberts more comfortable with his vote to uphold much of the law, two Democratic-appointed justices switched their votes on another part of the case and restricted a Medicaid expansion.

In other high-profile cases, the justices act like politicians in an even more fundamental way: They vote their party line, with Republican appointees on one side and Democratic appointees on the other. On more technical cases, with lower stakes, these blocs are less important, and the justices frequently issue unanimous decisions. But on the biggest cases — on climate change, labor unions, campaign finance, voting rights and more — a pure partisan split is the norm.

The central problem with today's court is that it is, at once, too powerful, too political and too partisan. Roberts would reject this criticism, of course. The one point he makes over and over in his public appearances is that the justices are not ideological. He is protesting too much.

Ross Douthat has made the conservative case against a super-empowered Supreme Court.

Several people have made the case for term limits for the justices, including Doug Bandow of the Cato Institute and me, in an earlier newsletter. The scholars Lori Ringhand and Paul Collins have laid out the pros and cons in The Washington Post.

And back on the subject of health care, Paul Krugman explains the latest Republican attempt to take away health insurance from a lot of people.