The Court’s Aggressive Term

John Roberts Jr., the chief justice of the United States, did not write the most important opinion of his court’s just concluded term, the one that allowed unlimited corporate and union spending in election campaigns. But his concurring opinion in that case, Citizens United v. Federal Election Commission, is the best guide to the court’s most unsettling tendency.

In the most recent term, even more than in earlier years, the Roberts court demonstrated its determination to act aggressively to undo aspects of law it found wanting, no matter the cost.

Explaining why the court’s five-vote majority in Citizens United had toppled precedent to reach its decision, Justice Roberts wrote that the court must be willing to depart from a previous decision if it thinks it does damage to a constitutional ideal, and particularly if the precedent was an aberration. A decision can become an aberration, it turns out, if the court’s conservatives never agreed with it in the first place. If not quite legislating from the bench, this is not a formula for stability.

It was not a thoroughly disappointing term. But the tone and posture of the court’s conservative majority made clear that it is not done asserting itself in redefining campaign finance laws, the rights of corporations, national security powers and the ownership of guns.

We do not argue that precedent must be worshiped and upheld at all costs. If that were the case, as Justice Roberts noted, segregation would still be legal and minimum-wage laws unconstitutional. But when the Brown v. Board of Education decision in 1954 overturned Plessy v. Ferguson from 1896 and outlawed segregation, it came after many years of relentless legal efforts against Jim Crow by Thurgood Marshall and many others. It was clear that the legal landscape was changing.
When the Roberts court overruled precedent in the Citizens United case, it did so far more abruptly. The dissenters, led by Justice John Paul Stevens, said the majority “blazes through our precedents” in a “dramatic break from our past.” It was nothing other than judicial activism when the court five months later stepped directly into the gubernatorial race in Arizona, cutting off matching funds to candidates participating in the state’s campaign finance system. The message to other states and cities with similar systems was clear: Watch out. When the Roberts court has a goal in mind, niceties like an actual political campaign cannot be allowed to get in the way.

The deference to corporate rights found in Citizens United could also be seen last month. The court made it harder for consumers and workers to challenge the mandatory arbitration clauses found in so many contracts, all designed to keep the fate of corporations out of the hands of judges and juries. When that mindset is combined with the court’s willingness to defy precedent and Congress, it could spell trouble for the national health care law when legal challenges reach the court.

But the court’s shifting majorities and Justice Roberts’s own preferences were unpredictable this year, leading to many welcome decisions. Life sentences for juvenile criminals who do not commit murder were banned. The vague “honest services” statutes, a favorite of prosecutors, were struck down.

Court decisions about property laws were ruled not to be “takings,” a blow to the property rights movement. And the court refused to put more categories of speech beyond the First Amendment.

Still, the problematic decisions continue to leave us worried about upcoming terms, where more decisions about fundamental rights await. In the last month alone, majorities on the court said gun ownership was a fundamental Second Amendment right that applies to states and cities, while reducing the First Amendment rights of those who try to pacify terrorist groups. If Elena Kagan is confirmed, her first task will be to keep her pledge and help the court realize that judicial modesty actually means something.