AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Free Speech/Campaign Finance

**Federal Election Commission v. Cruz, \_\_\_ U.S. \_\_** (2022)

*Ted Cruz, a senator from Texas, lent $260,000 to his 2018 reelection campaign. Section 304 of the Bipartisan Campaign Reform Act of 2022 permitted campaigns to repay all loans from the candidate within twenty days of the election, but only permitted loans up to $250,000 to be repaid after that time period. Ted Cruz for Senate could not pay Ted Cruz (the Senator) in the required twenty-day period. This meant that Cruz’s last $10,000 would be treated as a campaign contribution that would not be refunded. Cruz filed a lawsuit claiming that Section 304 violated the First Amendment. A three-judge district court panel held that the restriction on loan repayments was unconstitutional. The Federal Election Commission appealed that decision to the Supreme Court.*

*The Supreme Court by a 6-3 vote sustained the local district court. Chief Justice John Robert’s majority opinion held that Section 304 was an unconstitutional burden on speech that was not justified by any legitimate government interest. Why did the restriction on repaying candidate loans restrict speech? Was this a substantial restriction, as Roberts claims, or a minor restriction, as Justice Elena Kagan claimed in dissent? Why did Roberts insist the restriction was unlikely to prevent corruption or the appearance of corruption? Why did Kagan disagree? Who has the better of the argument? Neither the majority opinion nor the dissent explicit disputed the standards by which campaign finance laws are measured. Nevertheless, do the opinions suggest the majority wishes to hold campaign finance laws to a much higher standard than the dissent?*

CHIEF JUSTICE [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I76e828ded4e811ec8d3af7f709a0771b&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=b8493807ebcd4d7e83a821f32423cec9&contextData=(sc.Search)&analyticGuid=I76e828ded4e811ec8d3af7f709a0771b) delivered the opinion of the Court.

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Candidates for federal office may, consistent with federal law, use various sources to fund their campaigns. A candidate may spend an unlimited amount of his own money in support of his campaign. See *Buckley v. Valeo*, (1976). His campaign—a legal entity distinct from the candidate himself—may borrow an unlimited amount from third-party lenders or from the candidate himself. And campaigns may, of course, accept contributions directly from other organizations or from individuals, subject to monetary limitations. . . .

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The Constitution limits federal courts to deciding “Cases” and “Controversies.” Art. III, § 2. Among other things, that limitation requires a plaintiff to have standing. The requisite elements of Article III standing are well established: A plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, (3) that is likely to be redressed by the requested relief.

. . . . [W]e have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred. . . . Here . . . the appellees’ injuries are directly inflicted by the FEC's threatened enforcement of the provisions they now challenge. That appellees chose to subject themselves to those provisions does not change the fact that they *are* subject to them, and will face genuine legal penalties if they do not comply.

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. . . . Even under the Government's account, appellees have standing to challenge the threatened enforcement of Section 304. The present inability of the Committee to repay and Cruz to recover the final $10,000 Cruz loaned his campaign is, even if brought about by the agency's threatened enforcement of its regulation, traceable to the operation of Section 304 itself. An agency, after all, “literally has no power to act”—including under its regulations—unless and until Congress authorizes it to do so by statute.  An agency's regulation cannot “operate independently of ” the statute that authorized it.  And here, the FEC's 20-day rule was expressly promulgated to implement Section 304. Indeed, the Government admitted at oral argument that it could find no other basis to authorize enforcement of this regulation, and “concede[d]” that “the most likely result, if the statute were declared invalid, is that the regulation would cease to be on the books or would cease to be enforceable.”  Thus, if Section 304 is invalid and unenforceable—as Cruz and the Committee contend—the agency's 20-day rule is as well.

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The First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.”  It safeguards the ability of a candidate to use personal funds to finance campaign speech, protecting his freedom “to speak without legislative limit on behalf of his own candidacy. This broad protection, we have explained, “reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”

. . . . This provision, by design and effect, burdens candidates who wish to make expenditures on behalf of their own candidacy through personal loans. By restricting the sources of funds that campaigns may use to repay candidate loans, Section 304 increases the risk that such loans will not be repaid. That in turn inhibits candidates from loaning money to their campaigns in the first place, burdening core speech.

The data bear out the deterrent effect of Section 304. After BCRA was passed, there appeared a “clear clustering of [candidate] loans right at the $250,000 threshold.” There was no such clustering before the loan-repayment limitation went into effect. The Government's evidence in the District Court, moreover, reflects that the percentage of loans by Senate candidates for exactly $250,000 has increased tenfold since BCRA was passed. . . .

Quite apart from this record evidence, the burden on First Amendment expression is “evident and inherent” in the choice that candidates and their campaigns must confront.  Although Section 304 “does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right.”  That penalty, of course, is the significant risk that a candidate will not be repaid if he chooses to loan his campaign more than $250,000. And that risk in turn may deter some candidates from loaning money to their campaigns when they otherwise would, reducing the amount of political speech. This “drag” on a candidate's First Amendment right to use his own money to facilitate political speech is no less burdensome “simply because it attaches as a consequence of a statutorily imposed choice.”

The “drag,” moreover, is no small matter. Debt is a ubiquitous tool for financing electoral campaigns. The raw dollar amount of loans made to campaigns in any one election cycle is in the nine figures, “significantly exceeding” the amount of independent expenditures. And personal loans from candidates themselves constitute the bulk of this financing.

The ability to lend money to a campaign is especially important for new candidates and challengers. As a practical matter, personal loans will sometimes be the only way for an unknown challenger with limited connections to front-load campaign spending. And early spending—and thus early expression—is critical to a newcomer's success. A large personal loan also may be a useful tool to signal that the political outsider is confident enough in his campaign to have skin in the game, attracting the attention of donors and voters alike.. By inhibiting a candidate from using this critical source of campaign funding, however, Section 304 raises a barrier to entry—thus abridging political speech.

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This Court has recognized only one permissible ground for restricting political speech: the prevention of “*quid pro quo”* corruption or its appearance. We have consistently rejected attempts to restrict campaign speech based on other legislative aims. For example, we have denied attempts to reduce the amount of money in politics, to level electoral opportunities by equalizing candidate resources, and to limit the general influence a contributor may have over an elected official. However well intentioned such proposals may be, the First Amendment—as this Court has repeatedly emphasized—prohibits such attempts to tamper with the “right of citizens to choose who shall govern them.” . . .

. . . .

We greet the assertion of an anticorruption interest here with a measure of skepticism, for the loan-repayment limitation is yet another in a long line of “prophylaxis-upon-prophylaxis approach[es]” to regulating campaign finance.  Individual contributions to candidates for federal office, including those made after the candidate has won the election, are already regulated in order to prevent corruption or its appearance. Such contributions are capped at $2,900 per election and nontrivial contributions must be publicly disclosed, The dissent's dire predictions about the impact of today's decision elide the fact that the contributions at issue remain subject to these requirements. And the requirements are themselves prophylactic measures, given that “few if any contributions to candidates will involve *quid pro quo* arrangements.” . . .

Because the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than “simply posit the existence of the disease sought to be cured.”  It must instead point to “record evidence or legislative findings” demonstrating the need to address a special problem.  We have “never accepted mere conjecture as adequate to carry a First Amendment burden.” Yet the Government is unable to identify a single case of *quid pro quo* corruption in this context—even though most States do not impose a limit on the use of post-election contributions to repay candidate loans. . . . The Government instead puts forward a handful of media reports and anecdotes that it says illustrate the special risks associated with repaying candidate loans after an election. But as the District Court found, those reports “merely hypothesize that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidate.”  That is not the type of *quid pro quo*corruption the Government may target consistent with the First Amendment

. . . . ‘{O]our cases make clear that “the Government may not seek to limit the appearance of mere influence or access.”  As we have explained, influence and access “embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns. To be sure, the “line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights.”  And in drawing that line, “the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”

. . . . Essentially all the Government's evidence . . . concerns the sort of “corruption,” loosely conceived, that we have repeatedly explained is not legitimately regulated under the First Amendment. [An] academic article concludes that “indebted politicians” are “more likely to switch their votes” if they receive contributions from the banking or insurance industries. But the authors explicitly note that they cannot distinguish between voting pattern changes traceable to legitimate donor influence or access, and voting pattern changes as part of an illicit *quid pro quo*. See A. Ovtchinnikov & P. Valta, Self-Funding of Political Campaigns, Management Science, Articles in Advance 18 (April 7, 2022) As noted, our precedents demand adherence to that distinction.

The online poll the Government asks us to consider similarly misses the mark. The poll, conducted at the Government's behest for this litigation, reports that most respondents thought it “very likely” or “likely” that a person who “donate[s] money to a candidate's campaign after the election expect[s] a political favor in return.” App. 351–352. But it failed to ask whether those same respondents thought it likely that donors who contribute to a campaign *before*the election also are likely to expect political favors in return. Nor did the poll mention that the individual base limits still apply to such contributions. And it failed to define the term “political favor,” leaving unclear the critical issue whether the respondents associated such contributions with the direct exchange of money for official acts, which Congress may regulate, or simply increased influence and access, which Congress may not.

Finally, the Government places great weight on statements made by certain Members of Congress during debates that preceded the enactment of BCRA. . . . Nothing these legislators said, however, constitutes actual evidence that the loan-repayment limitation was necessary to prevent *quid pro quo* corruption or its appearance. And a few stray floor statements are not the same as “legislative findings” that might suggest a special problem to be addressed. [*Colorado Republican Federal Campaign Comm.*, 518 U.S. at 618, 116 S.Ct. 2309](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996141688&pubNum=0000780&originatingDoc=I76e828ded4e811ec8d3af7f709a0771b&refType=RP&fi=co_pp_sp_780_618&originationContext=document&transitionType=DocumentItem&ppcid=b8493807ebcd4d7e83a821f32423cec9&contextData=(sc.Search)#co_pp_sp_780_618).

All the above is pretty meager, given that we are considering restrictions on “the most fundamental First Amendment activities”—the right of candidates for political office to make their case to the American people. In any event, the legislative record helps appellees just as much as the Government, given that some Senators evidently viewed the limit as designed to protect incumbents like themselves from wealthy challengers. . . . That the limit may have been designed to protect incumbents should come as no surprise. Section 304 was enacted as part of the “Millionaire's Amendment” to BCRA, designed to hobble wealthy candidates mounting self-financed campaigns.

. . . . [W]e are talking about repayment of a *loan*, not a gift. If the candidate did not have the money to buy a car before he made a loan to his campaign, repayment of the loan would not change that in any way. On top of that, contributions that go toward retiring a candidate's debt could only arguably enrich the candidate if the candidate does not otherwise expect to be repaid. In other words, the Government's gift comparison is meaningful only if the baseline is that the campaign will default. . . . .

The analogy also proves too much. By the Government's logic, post-election contributions to retire candidate loans are little different from gifts given directly to the candidate. But that logic is belied by how the Government treats the two categories of purported “gifts.” On the one hand, federal law flatly prohibits candidates from using campaign contributions for personal purposes. By contrast, the postulated “gift-by-loan-repayment” limits are simply the individual contribution limits, which are now more than ten times higher than the gift limit: $2,900 per election. And Section 304 allows over 86 such “gifts” before a campaign hits the Act's $250,000 cap. Either the Government is openly tolerating a significant number of “gifts” far more generous than what it would normally think fit to allow, or post-election contributions that go toward retiring campaign debt are in no real sense “gifts” to a candidate. We find the latter answer more persuasive.

. . . . [T]he evidence here is scant, and Congress's judgment is hardly based on “vast amounts of data.”  Moreover, deference to Congress would be especially inappropriate where, as here, the legislative act may have been an effort to “insulate[ ] legislators from effective electoral challenge.”  In the end, it remains our role to decide whether a particular legislative choice is constitutional. And here the Government has not shown that Section 304 furthers a permissible anticorruption goal, rather than the impermissible objective of simply limiting the amount of money in politics.

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JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I76e828ded4e811ec8d3af7f709a0771b&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=b8493807ebcd4d7e83a821f32423cec9&contextData=(sc.Search)&analyticGuid=I76e828ded4e811ec8d3af7f709a0771b), with whom JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I76e828ded4e811ec8d3af7f709a0771b&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=b8493807ebcd4d7e83a821f32423cec9&contextData=(sc.Search)&analyticGuid=I76e828ded4e811ec8d3af7f709a0771b) and JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I76e828ded4e811ec8d3af7f709a0771b&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=b8493807ebcd4d7e83a821f32423cec9&contextData=(sc.Search)&analyticGuid=I76e828ded4e811ec8d3af7f709a0771b) join, dissenting.

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The campaign finance measure at issue here has for two decades checked the crooked exchanges just described. The provision, Section 304 of the Bipartisan Campaign Reform Act of 2002, prohibited a candidate from using post-election donations to repay loans exceeding $250,000 that he made to his campaign. The theory of the legislation is easy to grasp. Political contributions that will line a candidate's own pockets, given after his election to office, pose a special danger of corruption. The candidate has a more-than-usual interest in obtaining the money (to replenish his personal finances), and is now in a position to give something in return. The donors well understand his situation, and are eager to take advantage of it. In short, everyone's incentives are stacked to enhance the risk of dirty dealing. At the very least—even if an illicit exchange does not occur—the public will predictably perceive corruption in post-election payments directly enriching an officeholder. Congress enacted Section 304 to protect against those harms.

In striking down the law today, the Court greenlights all the sordid bargains Congress thought right to stop. The theory of the decision (unlike of the statute) is hard to fathom. The majority says that Section 304 violates the candidate's First Amendment rights by interfering with his ability to “self-fund” his campaign.  But the candidate can in fact *self*-fund all he likes. The law impedes only his ability to use *other people's* money to finance his campaign—much as standard (and permissible) contribution limits do. And even that third-party restriction is a modest one, applying only to post- (not pre-) election donations to repay sizable (not small) loans. So the majority overstates the First Amendment burdens Section 304 imposes. At the same time, the majority understates the anti-corruption values Section 304 serves. In the majority's view, there is “scant” danger here of *quid pro quo* corruption; loan repayments produce only the “sort of ‘corruption’ ” in which contributors wield “greater influence” over candidates than they otherwise would.  . . . [T]he conduct targeted by Section 304 threatens, if anything does, both corruption and the appearance of corruption of the *quid pro quo* kind. That is because the regulated transactions—as Members of Congress well knew from experience—personally enrich those already elected to office. In allowing those payments to go forward unrestrained, today's decision can only bring this country's political system into further disrepute.

In assessing a law's burden on speech, this Court's decisions all distinguish between restricting expenditures and restricting contributions. . . . In the usual case, the incidental effect of a contribution restriction on a campaign's speech does not count as a significant First Amendment burden.

Section 304 “entails only a marginal restriction” on speech, because it regulates contributions alone. The provision leaves a campaign free to spend any amount of money for speech. Likewise, it leaves the candidate himself—here, Senator Ted Cruz—free to do so. The candidate can (in the majority's words) “use personal funds to finance campaign speech” without limit; if he wishes, he can devote his whole fortune to “speech on behalf of his own candidacy.” . Section 304 restricts only the use of third-party contributions to support his efforts—which, as just shown, imposes a far more modest First Amendment burden. Recall how Section 304 works: It prevents post-election campaign contributions from going to repay large loans that the candidate has made to his campaign. So the provision limits—much as standard contribution caps do—only the candidate's ability to shift the costs of his electoral speech to others. Or said a bit differently, it addresses not a candidate's “self-fund[ing],” *ante*, at 1651, but only his reliance on third-party financing.

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. . . [E]very contribution regulation has some kind of indirect effect on electoral speech, and we have still understood them to impose only minimal burdens. Consider again a standard contribution ceiling, like the federal $2,900 cap. That limit, as we have acknowledged, makes raising money harder. And likewise, to return to the fact pattern here, the campaign has less money available than it otherwise would to repay a candidate's (or any other) loans. . . .

And more fundamentally, the majority fails to appreciate what Section 304 has an indirect effect *on*: lending, rather than spending, money. In the majority's view, those two activities count as one and the same. But they are not, in an obvious way. The *expenditure* of “personal funds” for speech, this Court has observed, “reduces the candidate's dependence” on donors—precisely because he is not trying to speak on their dime The *loan* of personal funds has the opposite effect, as further shown in this opinion's next part. When a candidate lends substantial funds to his campaign, he wants (maybe desperately needs) them returned; he thus risks—indeed, invites—dependence on donors, who alone can make him financially whole. . . .

Preventing *quid pro quo*corruption or its appearance is a compelling interest by any measure. *Quid pro quo* corruption—which extends beyond criminal bribery to “less blatant and specific” arrangements—“subver[ts] the political process” and threatens “the integrity of our system of representative democracy.”  And the appearance of that corruption (though scarcely mentioned in the majority opinion) is “[o]f almost equal concern.” [*Id.*, at 388, 120 S.Ct. 897](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000037927&pubNum=0000708&originatingDoc=I76e828ded4e811ec8d3af7f709a0771b&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=b8493807ebcd4d7e83a821f32423cec9&contextData=(sc.Search)). Avoiding that appearance is “critical” if public “confidence in the system of representative Government is not to be eroded to a disastrous extent.”

Serious dangers of actual and apparent *quid pro quo* corruption attend the transactions Section 304 regulates. . . . [W]hen a campaign uses a donation to repay the candidate's loan, every dollar given goes straight into the candidate's pocket. With each such contribution, his assets increase; he can now buy a car or make tuition payments or join a country club—all with his donors’ dollars. . . . . So post-election donors can be confident their money will enrich a candidate personally. And those donors have of course learned which candidate won.. . .  The recipe for *quid pro quo* corruption is thus in place: a donation to enhance the candidate's own wealth (the *quid*), made when he has become able to use the power of public office to the donor's advantage (the *quo*). The heightened threat of corruption—and, even more, of its appearance—is self-evident (except, it seems, to observers allergic to all campaign finance regulation).

In addressing that special danger, Section 304 is anything but a “prophylaxis-upon-prophylaxis,” as the majority labels it. . . . Regular seatbelts might suffice to protect drivers on the interstate, but special belts . . . are essential measures on the racetrack. So too, a $2,900 cap might suffice to prevent corruption from normal campaign contributions—but not from post-election contributions to repay a candidate's loan, and thus to enrich him personally. When Congress, as here, responds to a heightened threat with a heightened safeguard, the majority has no call to “greet” it “with a measure of skepticism.”

. . . . However much money the candidate had before he makes a loan to his campaign, he has less after it: The amount of the loan is the size of the hole in his bank account. . . . Until, that is, donors pay him back. Then, the hole is filled, the bank account replenished, and the purchasing power restored. That is a significant financial gain to the officeholder, courtesy of donors. If they had not stepped up, the officeholder would have been $250,000 poorer.

. . . . Contra the majority, the Government “has recognized throughout this litigation” not that winning candidates are usually repaid, but only that they are repaid more often than losing ones.  . . . The best empirical study suggests that a substantial portion of winning campaigns fail to retire candidate loans, even when their amounts are too small to trigger Section 304's restrictions. So a candidate with a loan outstanding has plenty of reason to feel anxious—and to see the loan's repayment as a gratitude-inducing personal benefit. . . .

The common sense of Section 304—the obviousness of the theory behind it—lessens the need for the Government to identify past cases of *quid pro quo* corruption involving candidate loan repayments. . . . The majority suggests that we should discard our understanding of how the world works because the Government has not come forward with adjudicated instances of corruption in the loan-repayment context. But *quid pro quo* exchanges, in that and every other setting, are nigh-impossible to detect and prove. That is indeed why we have campaign finance laws like Section 304. They prohibit conduct posing a heightened risk of corruption, so that the Government does not have to ferret out illicit exchanges case by case by case. . . . In any event, the Government and its *amici* have marshalled significant evidence showing that the loan repayments Section 304 targets have exactly the dangers Congress thought. . . . In Ohio, various law firms donated almost $200,000 to help the newly elected attorney general recoup his personal loans. Those donors later received more than 200 state contracts worth nearly $10 million in legal fees. . . .

An empirical study in the record confirms the dangers of corruption shown in those examples. The study first found, based on data preceding Section 304's enactment, that politicians carrying campaign debt were “significantly more likely” than their “debt-free counterparts” to “switch their votes” after receiving contributions from special interests. . . . Here, the data showed that politicians with debt exceeding the law's $250,000 threshold became “significantly less responsive” to contributions than before: They began to “behave remarkably similar to their debt free counterparts.”  In other words, Section 304 did just what Congress thought it would. By preventing post-election contributions from personally enriching politicians, the provision diminished donor-responsive voting. . . .

. . . A Government-commissioned survey of public opinion found that 81% of respondents believed it “very likely” or “likely” that a person who “donate[s] money to a candidate's campaign after the election expect[s] a political favor in return.” . . . The majority flyspecks the polling questions: But really—is it likely that such tinkering would have made a real difference? . . . .

. . . . Section 304 . . . limits one narrow use of third-party contributions to a campaign, thus “entail[ing] only a marginal restriction” on speech. And the provision targets a practice posing exceptional risks of *quid pro quo* deals. Repaying a candidate's loan after he has won election cannot serve the usual purposes of a contribution: The money comes too late to aid in any of his campaign activities. All the money does is enrich the candidate personally at a time when he can return the favor—by a vote, a contract, an appointment. It takes no political genius to see the heightened risk of corruption—the danger of “I'll make you richer and you'll make me richer” arrangements between donors and officeholders. Section 304 has guarded against that threat for two decades, but no longer. In discarding the statute, the Court fuels non-public-serving, self-interested governance. It injures the integrity, both actual and apparent, of the political process.