

# PROCÈS VERBAL

## Notebook, 4 March 2012: Oyez! Oyez! Koch v. Cato

BY [PAPICEK](#) POSTED ON [4 MARCH 2012](#)

### A CAUTIONARY TALE

The libertarian bastion Cato Institute is at this moment in court fighting for its life. The attack comes not from the dreaded government, not from the liberal left, but from its libertarian founder, [Charles Koch](#), who apparently believes Cato should abandon the trappings of a think tank in favor of a more directly partisan role in the 2012 election cycle.

Cato was founded in 1974 as the [Charles Koch Foundation](#) in Wichita, Kansas. To put this in perspective, this was a period when the groundwork was being laid for a revival of [Lochner era](#) jurisprudence, i.e., a reluctance on the part of the courts to uphold any law which infringed upon the machinations of free markets. During this period, Bernard Siegan penned his [Economic Liberties and the Constitution](#), James A. Dorn, his [Economic Liberties and the Judiciary](#), along with Henry Manne, who is described here as an [intellectual entrepreneur](#), and who was busily on tour giving lectures, [holding seminars](#), and becoming dean of [George Mason University Law School](#).

It was in this period of intellectual ferment that Charles Koch used his wealth to get in the game. The Cato Institute now publishes two peer-reviewed journals, [The Cato Journal](#) and [Regulation](#), as well as a variety of newsletters, research papers and more. Apparently, however, this is no longer enough for Koch. As a nonprofit corporation, the Cato Institute has an unusual structure allowed under the laws of Kansas. Funded entirely by donations, Koch enjoys some unusual rights even though the Koch Brothers are no longer the primary donor:

*Although they don't receive dividends like shareholders of a for-profit company, the structure gives the Koch brothers power to appoint half of Cato's board. In most nonprofits, new directors are elected by the organization's membership or the current board members.*

*"We think it's a really bad structure," said Robert Levy, Cato's board chairman. "We've repeatedly asked that it be changed."*

So here we are, witnessing an absurd chain of events in which a corporate board of directors battles founders for control of one of the most influential conservative think tanks in America. We are also witnessing the power of the [Koch family wealth](#), as well as the scope one wealthy individual enjoys. One wealthy individual who has no problem varying from the truth:

***We seek no ‘takeover,’ and this is not a hostile action.***

*This is at odds with both the words and deeds of the Koch brothers of late. Last year, they used their shares to place two of their operatives – Kevin Gentry and Nancy Pfotenbauer – on our board against the wishes of every single board member save for David Koch.*

***We want to ensure that Cato stays true to its fundamental principles of individual liberty, free markets, and peace into the future, and that it not be subject to the personal preferences of individual officers or directors.***

*Let’s take a look at a few of these new board members of ours. Kevin Gentry is a social conservative activist who’s also vice-chair of the Virginia GOP. Nancy Pfotenauer is a former spokesperson for the McCain campaign who has argued on television in favor of the Iraq war [sic] and the “don’t ask, don’t tell” policy pertaining to gays in the military. Ted Olson is a Republican super-lawyer who’s never identified himself as a libertarian.*

***The shareholder agreement ensures that donor intent will be honored.***

*Sometimes I hear that this is less about donor intent than it is about founder intent. Well, if we define “founders” as those initially given shares in Cato, only three of the five original shareholders remain alive and thus can have an informed opinion about these goings-on; Charles, Ed, and George Pearson. Two of those three are appalled by what is going on and want the shareholder agreement dissolved.*

***This is simply about the rule of law.***

*Regardless, as you well note, this bid by the Kochs to take over Cato – if successful – can only lead to the destruction of the most prominent and influential libertarian think tank in the world.*

***The shareholder agreement has worked well thus far and so it should continue to be respected.***

*Shareholder control has been dormant for decades. The shareholders have not met – in person or on the telephone – from 1981 through 2008. No shareholder had asked for a meeting over that time despite a requirement of annual meetings.*

*—Jonathan H. Adler, *The Volokh Conspiracy*, [Koch V. Cato — A View from Cato](#). Accessed 4 March, 2012.*

In attempting to pack Cato’s board with GOP political operatives (and dispensing with the pretense that the Cato Institute was ever anything but politically driven), the Koch brothers are attempting to get all their ducks in a row for the 2012 election cycle, uniting Cato with [Americans for Prosperity](#), if not its poorer sibling, [FreedomWorks](#), both Koch organizations as well. This is how American politics works. A few wealthy people can cobble together a coalition of voters and activists spanning class and regional differences: Cato for the thinking conservative. Americans for Prosperity for the businessmen who *do*, and FreedomWorks for the culture warriors. Both FreedomWorks and AFP provided substantial support for the Tea Party movement as well. Is this the secret of GOP unity, or merely an affect? I don’t know. However, having major, well-funded, and diverse organizations under such tight control is certainly a fact of American political life which cannot be

ignored in either case. Certainly, it is a wonderful illustration how just two people with enough money can build such enormous political reach.

I cannot say that I'm not enjoying watching these libertarians revolt against being given their marching orders from the "private sector," or that I have not escaped feeling rather smug while watching my intellectual and political opponents make my point that, *at the very least*, being driven by government fiat is no worse than being driven by the whim of a wealthy individual or a corporate group.

So while I sit back and enjoy the show, it should be noted, once again, that irony should be avoided at all cost.