

**Brad DeLong**  
**Grasping Reality with the Invisible Hand**  
**Fair, Balanced, and Reality-Based**

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## ***THE CATO INSTITUTE CLARIFIES ITS LEGAL POSITION...***

Cato's legal position:

Save Cato: Cato acknowledges that, at some point, Niskanen's stock must be tendered to the Institute. But the Agreement specifies that Cato need not purchase the offered stock. If the board elects not to purchase, the stock is then offered to the remaining stockholders, but only if the board deems that a purchase by Cato would have been "inconsistent with its corporate purposes." In other words, if the board declines to purchase the stock for some other reason — e.g., to honor Niskanen's wishes as expressed in his will — the stock does not have to be offered to the remaining stockholders and may be transferred pursuant to Niskanen's last will and testament [to his widow].

Finally, with respect to the Institute's governance structure: A stockholder arrangement for a nonprofit corporation is unusual, but not impermissible. That type of structure is clearly allowed under Kansas and federal law. Moreover, the Institute has disclosed its structure on its Form 990, filed annually with the Internal Revenue Service. Stockholders of a nonprofit can elect the board of directors, but stockholders do not have a property right in corporate assets or a financial interest in donations.

An alternate and more typical nonprofit structure — control by "members" — involves designating individuals as members whose function is to elect the board. In many nonprofits, the members are the directors themselves. Thus the board, in effect, is self-perpetuating. But nothing would preclude the members from being other persons, including the same persons who are currently the Institute's stockholders. In other words, the designation as a "member" or "stockholder" of a nonprofit is not material. There are no "owners" — just persons who elect the board.

The key question for Cato is whether our board will consist of the type of individuals who for 35 years operated the Institute as a non-partisan, non-aligned, independent source of libertarian views on key policy questions, or individuals who might be perceived as controlled by, affiliated with, or responsive to, Charles and David Koch as they pursue their many political and corporate interests.

So Cato's argument is that (i) Niskanen's estate offers his shares to Cato, (ii) Cato declares that although it is consistent with its corporate purposes to purchase the stock it will not do so, (iii) the other shareholders' options to purchase the stock are then not triggered, and so (iv) the stock passes to Niskanen's widow? That the event that triggers the other stockholders' option to purchase is not Cato's refusal to purchase but rather Cato's declaration that purchasing the stock would be inconsistent with its corporate purposes--and if that declaration is not made, the options are not triggered?

How do you think that is going to work for them?

As I say, the fact that Cato is libertarian makes it difficult for them to coherently explain what is wrong with the Kochs' plans--the best that Ed Crane can do is say: "The Koch Brothers have the right to take Cato over but that would not be right..."