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## **The open society and its animals**

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## Enfranchising animals in political institutions

### Introduction

The extreme political subordination of non-human animals is an alarming and fundamental problem of liberal democracies. Due to the suppressive and human-exclusive character of current-day liberal democratic institutions, some thinkers have lost confidence in these institutions, and have even argued that animal advocates have no reason to respect the prevailing political institutions.<sup>198</sup> This fatalistic and potentially anarchistic view of the matter is not shared in this book, however. The current blindness of liberal democratic institutions to non-human animals is worrying, but it need not cause us to lose all faith in the liberal democratic institutions or to disrespect them, nor does it mean that the liberal democratic model as such is to be discarded with. After all, there is not the smallest indication that other political systems could better accommodate a fair political and legal position for non-human animals, let alone while also offering the fruits of liberal democratic systems, such as political equality and respect for individuality, autonomy, and personal freedom. Furthermore, in *The Open Society and Its Enemies*, Karl Popper rightly points out that “It is quite wrong to blame democracy for the political shortcomings of a democratic state. We should rather blame ourselves, that is to say, the citizens of the democratic state. ... Those who criticize democracy on any ‘moral’ grounds fail to distinguish between personal and institutional problems. It rests with us to improve matters. The democratic institutions cannot improve themselves. The problem of improving them is always a problem for *persons* rather than

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<sup>198</sup> Friederike Schmitz, “Animal Ethics and Human Institutions: Integrating Animals Into Political Theory,” in *The Political Turn in Animal Ethics*, eds. Robert Garner and Siobhan O’Sullivan (London: Rowman & Littlefield, 2016), 43.

for institutions. But if we want improvements, we must make clear which *institutions* we want to improve” (italics original).<sup>199</sup> In other words: if we are of the opinion that current institutions have serious shortcomings when it comes to the enfranchisement of non-human animals, we must not immediately throw in the towel and resign ourselves to democracy’s failure but instead work on improving the institutions which show the defects in question. Humans are not helpless creatures who can only passively observe the liberal democratic institutions and stand by while they somehow mysteriously change into something unacceptable. Humans are the creators, guardians, and adapters of institutions, and if these institutions fall short in one way or another, we can gather our social “tools” and start adapting them in the preferred direction. As Popper reminds us, democracy itself provides the institutional framework for the reform of political institutions, but what democracy cannot do is provide *reason*. Only humans can “inject” reason into political institutions while designing new ones or adjusting old ones.<sup>200</sup> We are thus not necessarily stuck with the current unreasonable and anthropocentric institutions. It must be, in principle, possible to adjust the institutions of our open societies in such a way that they will come to reflect a reasonable regard for non-human animals’ interests, if only humans find the urge to do so. Liberal democracies have shown to be astonishingly flexible in the sense that their political and legal institutions can adapt to radically changed ideas of equality, and there is no reason to think that this is not possible this time. If we, like Popper, think of liberal democracy as an almost “scientific” political model that continuously facilitates adaptation to the latest knowledge and moral convictions through gradually abandoning the social policies that could not withstand critical scrutiny, then there is some reason to be optimistic.<sup>201</sup> Current liberal democracies, which have institutionalized the scientific method to learn from mistakes, might be saved from the accusation of being illegitimate if the currently neglected

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<sup>199</sup> Popper, *The Open Society and Its Enemies* (Vol. I), 127.

<sup>200</sup> Popper, *The Open Society and Its Enemies* (Vol. I), 126.

<sup>201</sup> Karl Popper, *The Poverty of Historicism* (London: Routledge & Kegan Paul Ltd, 2004/1957); Popper, *The Open Society and Its Enemies*; Michael Shermer, *The Moral Arc: How Science and Reason Lead Humanity Toward Truth, Justice and Freedom* (New York: Henry Holt and Company, 2015).

interests of non-human animals are institutionalized by humans. This would, in sound Popperian reasoning, indeed enhance the open society, since Popper believed that minimizing suffering and fighting tyranny were two fundamental moral demands for mankind.<sup>202</sup>

There are roughly two potential ways in which the enfranchisement of non-human animals in liberal democratic institutions can take form: one political, the other legal. The first option is institutionalizing the consideration right of animals in *political* institutions. In this division between political and legal institutions, political institutions are taken to be all governmental institutions concerned with the legislative and executive processes of a liberal democratic state. A successful enfranchisement of non-human animals in these political institutions would have the result that animal interests become a factor in the political deliberations of a state, and thus, ideally, their interests would be duly referenced in the legislation and policies that follow from this deliberation. Examples of incorporating animal interests in political institutions could be reserving a number of seats in parliament for animal representatives or installing a commission (possibly with veto power) on issues related to animal welfare.

The second way in which the enfranchisement of non-human animals in liberal democratic institutions can take form is through institutionalizing the consideration right of non-human animals in the *legal* framework of a liberal democracy, which comprises the institutions essential for the rule-of-law element of a liberal democracy. Through adopting legally binding duties for humans to respect the interests of non-human animals and by creating some type of institutional embedding for this, non-human animals could be legally enfranchised. Examples of incorporating animal interests in legal institutions are introducing a constitutional state objective on animal welfare or fundamental legal rights for non-human animals.

The distinction used here between the “political” and “legal” institutions of a liberal democracy obviously is only a simplification of the much more complex reality in which legal and political aspects of a liberal democratic state often overlap and mutually affect one another. The

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<sup>202</sup> Popper, *The Open Society and Its Enemies* (Vol. I), 65, 235 (note 6).

constitution, for example, often details not only the most fundamental political structures of a state but also the most important legal rights of citizens. It is thus impossible to say whether the constitution is “political” or “legal,” for it clearly has characteristics of both. Similarly, the legislative body is not merely “political”: because it produces law, it could, from that perspective, also be labelled as “legal.” Not even the law itself is straightforwardly “legal,” for many legal rules have important political side-effects or regulate political processes. Likewise, the “political” enfranchisement of animals will ultimately only be possible through legal changes that demand and establish adaptations in the political processes. Even though the distinction between political and legal institutions is thus far from ideal, distinguishing between institutions in this way is necessary to bring some structure to the many and divergent options of giving effect to animals’ consideration right that will be discussed in the remainder of this book.

In this chapter, the possibility of *politically* institutionalizing regard for non-human animal interests will be investigated. To this end, the most important general challenges of politically incorporating animals’ consideration right will be discussed and analysed. In the first section, the six most important and foreseeable challenges of politically institutionalizing animal interests will be discussed. They are: (I) whether non-human animals can be politically represented by humans at all; (II) the challenge of determining the right content of representation; (III) the challenge that animal representatives must be prevented from abusing their political power; (IV) the challenge of determining the right amount of political power that ought to be assigned to animal representatives; (V) the challenge of controlling the democratic costs<sup>203</sup> of politically enfranchising non-human animals; (VI) the challenge of institutionally dealing with the heterogeneity of animals’ interests. In the second section, the findings of the first section are brought together and analysed as a whole, mainly against the background of the five criteria for animal enfranchisement. In the third section, it will be elucidated that, given

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<sup>203</sup> The term *democratic costs* refers to immaterial costs that the endeavour of enfranchising non-human animals may incur, which could be problematic from a democratic point of view.

the deeper characteristics of the political sphere, it is not realistic to expect that all the requirements for animal enfranchisement will be met by merely making institutional adjustments in the political sphere.

### **3.1 Challenges of politically institutionalizing regard for animal interests**

There seem to be many possibilities of politically institutionalizing a certain regard for animal interests. Some examples are installing an animal ombudsman, reserving a certain amount of seats in parliament for animal representatives, and introducing an extra-parliamentary committee on animal welfare. Apart from the fact that one can think of many different such models for politically enfranchising animals, the specific institutional embedding of each of those options could also be up for debate. Specific details concerning, among other things, the competences of such new institutions, the selection of representatives or other occupants of key positions, and the embedding of such institutions in the pre-existing balance of powers are not fixed and could vary significantly. What should the competences of an extra-parliamentary committee be? What qualifications should a candidate animal ombudsman have? Who or what institution should review the work of permanent animal representatives in parliament? There are no fixed answers to these questions, for, in principle, we could design such models in any way we like. The fact that many political enfranchisement models are conceivable, combined with the fact that the details of each of these models can also vary greatly, means that there is an almost indefinite pool of options for politically enfranchising animals. It is therefore impossible to exhaustingly investigate all the conceivable models of political animal enfranchisement on their own specific merits, and this chapter has no pretention to do so.

A different methodology of investigating the possibilities of politically enfranchising animals is possible, however, and that is to analyse which overarching problems we are likely to encounter in all or many such models of political animal enfranchisement. It is possible to investigate the enfranchisement of animals from a more abstract perspective and look for overarching challenges that seem to be inherent to the political enfranchisement of animals as such and are thus likely to be apparent in

many of these specific models. The benefit of this methodology is that this type of analysis will enable us to eventually establish some more general recommendations about the political enfranchisement of non-human animals, recommendations which should be relevant to a great number of specific models of political animal enfranchisement.

### *I. The challenge of representing non-human animals*

The first challenge that is immediately apparent when considering political animal enfranchisement concerns the difficulty of politically representing non-human animals. We have established before that non-human animals are political patients and that they are thus in need of human assistance if they are to have any meaningful political status at all. But is it possible to politically represent non-human animals?

The fact that non-human animals are by definition political patients seems to create additional challenges when it comes to their political representation. Our communication with non-human animals is far from ideal, non-human animals cannot comprehend politics, and they cannot reflect on the world as required for political acting. As a result of these difficulties, we cannot rely on the political mechanisms that generally seem to work in the case of human representation.<sup>204</sup> Essential to the representation of human agents is hearing what their political preferences are, but this is obviously not practicable with non-human animals. Additionally, only human agents are able to communicate their explicit discontent if their representative does not offer the kind of representation wished for. Human agents can, in other words, communicate their political wishes and preferences to their representatives and redirect them if necessary, while non-human animals cannot. It has been suggested by some thinkers that these deficiencies of non-human animals disqualify them as candidates for formal political representation. Hanna Pitkin, for example, argues that necessary preconditions for formal representation are having a

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<sup>204</sup> Smith, *Governing Animals*, 103–105. With regard to the representation of future people, Kristian Skagen Ekeli has similarly pointed out that common political mechanisms such as authorization and accountability are impracticable: Ekeli, “Constitutional Experiments,” 450. Obviously, to say that these mechanisms generally seem to work in the case of human representation is not to say that the representation of humans in liberal democracies is flawless and cannot be further improved.

will of one's own, having some sort of capability to judge the representatives on the rightness of the offered representation, and being able to initiate government activity. Without having such a will and capabilities of "action and judgment," politicians would be taking care of their constituents rather than representing them, just like parents take care of their children instead of representing them, writes Pitkin.<sup>205</sup> Given the obvious impotence of non-human animals to instruct and judge their hypothetical representatives, it indeed seems right to say that this classic form of formal representation as it currently works for human agents is not an option in their case.

The inability of non-human animals to scrutinize and reflect on the offered representation does not, however, necessarily lead to having to abandon the idea of politically representing animals altogether, because different types of representation exist. In his essay "The Rights of Animals and Unborn Generations," political and legal philosopher Joel Feinberg points out that there is no logical reason to require that a principal must be able to direct and instruct his representative.<sup>206</sup> Although Feinberg stresses this point in the context of the *legal* representation of non-human animals, his arguments are similarly relevant to the claim that non-human animals cannot be *politically* represented on account of their incompetence to direct and instruct their representatives. Feinberg argues that although some type of active steering of the representative by the represented is generally apparent in typical representative relationships, "there appears to be no reason of a logical or conceptual kind why that *must* be so" (italics original).<sup>207</sup> There seems to be, in other words, simply no reason to demand that represented animals have the capacity to appoint, instruct, and control their representatives themselves. Moreover, human political patients who are similarly "incompetent" in relevant ways exist, and these individuals are not excluded from representation either. To the contrary, they have access to legal representatives who can be appointed to act on their behalf. These representatives must exercise their own professional judgment in deciding what adequately acting on behalf of the principal requires. Feinberg: "Small

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<sup>205</sup> Pitkin, *The Concept of Representation*, 154, 162, 209–211, 232; Smith, *Governing Animals*, 103–109.

<sup>206</sup> Feinberg, "The Rights of Animals and Unborn Generations," 43–68.

<sup>207</sup> Feinberg, "The Rights of Animals and Unborn Generations," 48.

children and mentally deficient and deranged adults are commonly represented by trustees and attorneys, even though they are incapable of granting their own consent to the representation, or ... of giving directions."<sup>208</sup> In this framework, much is required of the legal representative, but little or no demands are made on the principal, because he may leave everything to the judgement of his agent.<sup>209</sup> This makes this type of representation particularly suitable for principals who lack independent judgement and action capabilities, such as non-human animals. There is, according to Feinberg, no reason to assume that this type of legal-trustee representation should not be open to other animals. Similarly, in the context of political representation, the shortcomings of non-human animals need not immediately lead to the radical conclusion that political representation as such is impossible. Instead, it seems appropriate to be more nuanced and hold that only the type of political representation as it is currently used for human political agents is untenable for non-human animals. A different kind of representation might be still possible and adequate, however. Trustee representation, a form of political caretaking that places lower demands on the represented but higher demands on the trustees who will politically represent them seems particularly suitable in the case of non-human animals.

Gregory S. Kavka and Virginia Warren, in their search for possibilities of political representation for future people, take a road that is similar to that of Feinberg.<sup>210</sup> It was previously pointed out that, among other things, future people are similar to non-human animals in that both are unable to instruct their political representatives. In exploring the theoretical relevance of this complicating circumstance, Kavka and Warren echo Feinberg's standpoint that the fact that principals cannot communicate their wishes to their representatives does not necessarily mean that representation as such is impossible. They add, however, that this would only be true if the representative were completely in the dark about what the interests of his principal are. Then, obviously, no form of political or legal

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<sup>208</sup> Feinberg, "The Rights of Animals and Unborn Generations," 48.

<sup>209</sup> Feinberg, "The Rights of Animals and Unborn Generations," 48.

<sup>210</sup> Kavka and Warren, "Political Representation for Future Generations," 21–39.

representation would be practically possible. Kavka and Warren: “If one party [had] no reasonable beliefs at all about what another party’s interests are, ... it would be impossible for the former to represent the latter, except by acting on the latter’s instructions.”<sup>211</sup> In other words: a lack of instructions is, on its own, not detrimental to the possibility of representation; that is only the case in combination with complete ignorance about the interests of the principal. However, as long as there is some information available about what the principal’s interests are, there is no reason to claim that the inability of the principal to instruct his representative is fatal to political representation altogether. An atypical kind of representation is still possible if the representative is able to make “better than random” judgments about the likely interests of the principal and how policies may affect these interests.<sup>212</sup> Since it is possible for humans to have some idea about what the interests of sentient non-human animals are, it is not necessary to disqualify non-human animals for political representation on the grounds that they are unable to instruct their representatives. This circumstance will, however, place greater demands on the representative, for he will have to give substance to his profession by acting as a political trustee, as will be discussed in the next subsection.

## *II. Content of representation and political guardianship*

The incompetence of non-human animals to directly inform and instruct their representatives puts additional pressure on the responsibility of the representative in determining the content of the representation. In general forms of representation, the representative can relatively easily determine the content of representation mainly by listening to what political preferences human agents explicate. However, this source of information is largely absent in the case of non-human animal representation. Non-human animals cannot always communicate their personal preferences, and certainly not political preferences and ideas. Therefore, determining the content of non-human representation cannot take place in the same way as

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<sup>211</sup> Kavka and Warren, “Political Representation for Future Generations,” 24–25.

<sup>212</sup> Kavka and Warren, “Political Representation for Future Generations,” 25.

that of humans.<sup>213</sup> Furthermore, it remains to be seen whether the preferences of non-human animals—if even somehow (physically) expressed—should be really leading animal representatives in their political representation of animals. Determining the content of representation thus is quite a challenge for any political animal representative.

Generally, there seem to be two sources which can define the content of representation. First, the interests of the represented. Second, the preferences of the represented. In this distinction between preferences and interests, interests are best understood as they were defined before: a certain good or action is in an individual's interest if it positively affects the well-being of that individual. Preferences, on the other hand, are expressions of (political) will. Preferences often overlap with interests, that is: people often want what is conducive to their well-being, but this is not necessarily the case. In what follows, preferences that run counter to the actual interests of an individual will be termed "irrational preferences." An example of such an irrational preference is some peoples' preference to use a tanning bed, even though this runs counter to their objective interests in maintaining good health, because using a tanning bed increases the chance of developing skin cancer, and thus may cause an unpleasant sickbed and shorten a person's lifespan. For most people, in all likelihood, the overall happiness gained from using a tanning bed will, on balance, not weigh up to (the risk of) getting seriously ill and shortening their lifespan. In those cases, the preference for using a tanning bed can be deemed an irrational preference, because the preference is not in alignment with the overall interests of that person. In some exceptional cases, however, using a tanning bed may bring a person so much happiness and thus increase his well-being so much that, on balance, this outweighs the negative impact that the practice has on his health interests. In these exceptional cases, the preference for using a tanning bed can be qualified as a rational preference that still is in that person's

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<sup>213</sup> It is not denied here that there will probably always be some interpretation problems in the communication between representatives and the represented, even between perfectly capable human representatives and perfectly capable human constituents. The point made here, however, is that human language enables us to express our preferences quite straightforwardly to one another, and thus gets us a long way in narrowing the interpretation gap, much more so than imperfect types of communication with other animals can.

interest, because on balance it has a positive impact on the well-being of that individual.

The distinction between interests and preferences is important in this context of discussing the content of animal representation, for it might be argued that the accent on either preferences or interests is different in the case of non-human animal representation when compared to human representation. It seems logical that, in the representation of political agents, the *preferences* of the represented are of pivotal value, whereas representing political patients requires the representative to focus more on the *interests* of the represented. In other words, it seems that representatives of political agents should focus more on the preferences of their constituents, whereas representatives of political patients should focus more on the actual interests of their principals.

Human agents generally have a well-developed capacity to understand and reflect on the world and on their own lives, and they can make relatively good predictions of future events, because they know and understand (many of) the causal rules of the world. For this reason, it is relatively uncontroversial to presume that they can generally autonomously understand their own interests and that they, in some cases, may deliberately prefer something that runs counter to their objective interests. We accept, in other words, that human agents sometimes have and pursue irrational preferences, such as using a tanning bed while this, on balance, negatively affects the well-being of that person. If a human agent has such irrational preferences and acts on them, we assume that he understands the consequences of this choice, and we deem it acceptable or even preferable that a political representative honours this choice out of respect for the autonomous and informed choice of his constituent. Exactly because human agents are rational and because they are capable of reflecting on their own lives in a complex way, we accept that human agents can politically pursue something that, strictly speaking, contradicts their objective interests. Smokers can politically pursue lower taxes on cigarettes, even though they are aware that this may stimulate the behaviour that poses a risk to their health and even if the pros of smoking do not weigh up to the cons in light of these people's overall well-being. Besides interests, liberal democracies

also value individual autonomy, and consequently ideally abstain from paternalism over informed, rational, and autonomous individuals. Consequently, representative politicians are generally expected to follow up on these sometimes irrational preferences of the electorate.

Obviously, other animals express (irrational) preferences too, and one could argue that these should also be uncritically accepted by their representatives as genuine political positions under the umbrella of respect for individual autonomy. This would mean that animal representatives would have to take the expressed preferences of non-human animals as their lead in determining the content of representation, even if these preferences are irrational in the sense of impairing the overall well-being of the animals themselves. However, having such “respect” for the autonomy of the non-human animal would be misplaced. Precisely because non-human animals are equipped with fewer capacities that allow them to be informed about the world and the consequences of their actions, politically respecting all of their preferences, including irrational ones, would be a mistake. This can be clarified with an example.

Suppose a certain national nature park is struggling with an alarming outbreak of a lethal canine disease. Several wolves have been found dead and a couple of companion dogs who have entered the park have also met their end because of the disease. For this reason, the park is temporarily closed off for companion dogs. It is plausible that many dogs, especially those who are used to having their daily walk in this park, want to enter the park nonetheless, and express these preferences by forcefully pulling their human companions in the direction of the park entrance and swinging their tails when approaching the park. A local political animal representative may translate these expressions of dog preferences into a political preference for lifting the dog ban on the park. Must he, as a matter of representing the dogs, respect the dogs’ irrational preferences and politically pursue withdrawing the dog ban on the park, even though he knows that this may lead to more dog deaths? Are these expressed dog preferences, in other words, to be politically respected the same way as the sunbather’s autonomous but irrational wish to reduce taxes on entrance fees for tanning salons?

There are two things that this example illustrates. First, it illustrates that it is, unlike Kimberly K. Smith argues, not true that “we can assume that they [non-human animals] want what is conducive to their welfare.”<sup>214</sup> Non-human animals, like the dogs wishing to enter a contaminated park, obviously often want what harms their welfare. Other examples of animals having such irrational preferences are animals wanting to eat themselves into obesity; animals not wanting to eat, drink, or go to the veterinarian when ill; animals wanting to scratch open healing wounds; or animals wanting to play wildly while recovering from a bone fracture. In all these examples, animals have preferences that, if pursued, would directly run counter to their objective interests. In contradiction to Smith’s assertion, the preferences of non-human animals thus are often a poor indication of animals’ actual interests.

The second thing that this example illustrates is that animal representatives should not uncritically accept and politically pursue all expressed preferences of non-human animals. It would be an obvious mistake for the animal representative in the example to respect the dogs’ wishes to go into the contaminated park by politically pleading for lifting the ban. This would have the effect of pleading for policy that leads to the death of some of the representative’s principals. That does not seem to ever be an acceptable fulfilment of the task of animal representatives. Still, the theoretical question remains what the relevant difference between the human constituents’ preferences and the non-human animal principals’ preferences is. Why are humans’ irrational preferences generally to be politically respected and non-human animals’ irrational preferences generally not?

Importantly, non-human animals are, in a fundamental way, generally *uninformed*. They are generally uninformed about many facts of the world, and ignorant of many rules of logic that rule the world, mainly because humankind has not yet succeeded in communicating this abundance of complex information to other animals (supposing that some other animals possess the capacities necessary to process such information).

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<sup>214</sup> Smith, *Governing Animals*, 104.

This information, however, enables a person in general to envision the alternatives he has (going to the tanning salon or not), to make reliable predictions about his own future well-being when each of these alternatives is pursued (increased risk of an early death due to skin cancer or not), and to make an autonomous choice between these alternatives (accepting the increased risk of an early death or not). Crucially, lack of information generally prevents non-human animals from envisioning the alternatives they have (entering a contaminated park or not), from making reliable predictions about their own future well-being when each of these alternatives is pursued (possibly dying of the canine disease or not), and thus from making an autonomous choice between these alternatives (accepting this possible early death or not). In other words, unlike most people who visit tanning salons, non-human animals often cannot oversee the consequences of their choices and actions. Whereas the tanning salon visitor is generally aware of the consequences of his unhealthy behaviour and may autonomously choose to continue sunbathing nonetheless, the dog wanting to enter the park has no idea of the contamination, nor that entering the park may cost him his life. The irrational preferences of the tanning salon visitor on the one hand and the dog on the other hand are thus not fully comparable, and thus also not equally respectable. The crucial difference seems to be whether an individual is making an *autonomous and informed choice* to either accept the foreseeable consequences or not. The tanning salon visitor's preference rests on an informed, considered, and autonomous decision, whereas the dog's preference is shrouded in ignorance, and rests on no such decision at all.<sup>215</sup> Implied in the preference of the tanning salon visitor is the acceptance of the fact that he may get ill and die years sooner than necessary. In most cases, he is aware of that, he has autonomously weighed the pros and cons of continuing to sunbathe, and he has autonomously accepted the consequence of risking illness and early death. The dog will also risk early death if his irrational preference is carried out, but unlike the sunbather, the dog is not aware of this, and thus cannot and has not autonomously accepted this fatal consequence. Because of his

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<sup>215</sup> That is, insofar as the sunbather is a moral agent and insofar as addiction does not impair his autonomy. Moral patency and addiction reduce the level of autonomy implied in the preference.

fundamental uninformedness, the dog was never in the position to weigh the pros and cons of entering the nature park. Putting the dog's irrational preference into political practice thus does not seem to constitute respect for his autonomy but rather respect for his ignorance, which is much less laudable—and certainly not prescribed by liberal democratic principles. It is important to emphasize here that even though it may be true that non-human animals *generally* do not express the type of reflected preferences that humans generally have, it cannot be ruled out that some non-human animals may, on some exceptional occasions, have perfect information positions and express preferences in the full sense of implying an informed and autonomous decision. Such exceptionally informed and autonomous decisions should ideally be respected in the political reflections of the animal representative.<sup>216</sup> In general, however, non-human animal preferences are likely to be under-informed and under-reflected preferences, because of their generally poor information position.

When we compare the situation of human agents with that of non-human animals in light of what the content of political representation should be, we see some important differences. The content of human agents' representation is primarily determined by their explicated preferences—even if these are irrational from an objective point of view. It is, however, much harder to ask non-human animals what they wish for, and even if they could occasionally communicate their preferences to us, animal representatives would still have to filter out the preferences that run counter to animals' actual, objective interests. Therefore, to construct the content of political representation, animal representatives will have to determine what animals' actual interests are and politically pursue these interests. In determining the scope of their interests, scientific facts, experience, and rationality must be leading. Crucially, these three factors are often a better indication of non-human animals' interests than the animal's own will. Just

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<sup>216</sup> Neither the uninformedness of non-human animals nor the informedness of humans are a natural given. Obviously, exceptions exist. In general, however, it seems fair to say that *most human individuals* can achieve some level of essential informedness, whereas *most non-human individuals* cannot. Since we are discussing this subject in the context of how a political system should, in general, be set up, it seems prudent to work with these generalizations. Needless to say, institutional exemptions should be arranged for individuals who deviate from these generalizations.

like the profession of a child advocacy attorney sometimes requires him to *not* act on the child's direct preferences for the child's own sake, so must the animal representative deploy his own judgment rather than blindly replicating the preferences of animals in political contexts. If non-human animals express preferences, they ought to play a secondary role in their political representation. Dogs may wish to enter a contaminated park, but scientific facts, experience, and rationality tell us that it is in their interest not to grant this wish. Human agents, with their superior knowledge about the facts of the world and its causal rules, which in combination enables them to make superior predictions of future states of well-being, are generally in the best position to make such decisions for dogs. This means that in some cases, the preferences of non-human animals may be overruled, but only if scientific facts, experience, or rationality tells us that it is in the animals' own overall interests.<sup>217</sup> Crucially, the profession of the animal representative is thus not so much representing the animals themselves, with all their irrational and harmful preferences, but rather to represent the interests of these animals.<sup>218</sup>

### *Burkean trusteeship*

It thus seems that, in order to make the political representation of non-human animals work, we must make high demands of the role of the representative. The animal representative must be able to filter out the irrational preferences of non-human animals that would harm their own interests if acted upon. Such an understanding of what it takes to be a representative is not at all new. A political-theoretical background for such a rich understanding of the representative's profession can be found in Edmund Burke's work on political trusteeship. Confronted with the challenges of non-human political representation, breathing life back into his traditional concept of trustee representation may prove to be valuable.

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<sup>217</sup> Obviously, the negative impact that restraining the animal's will has on his well-being (such as the disappointment that follows from being prevented from going into the park, or the anxiety that follows from being forced to go to the veterinarian) ought also to be taken into account in this weighing process.

<sup>218</sup> See on this point of representing either *people* or *people's interests* in the context of the representation of future people: Kavka and Warren, "Political Representation for Future Generations," 24.

Edmund Burke was an Irish philosopher and a practicing politician for the Whig Party who made name for himself as the founding father of conservatism.<sup>219</sup> Being a political philosopher and a practicing politician himself, Burke had distinguished thoughts about the proper fulfilment of the profession of the political representative.<sup>220</sup> Burke was a known defender of the idea of political trustee representation, in which the emphasis is on the representative's own autonomy and judgement, rather than on the wishes of the constituency. He thought that, in political representation, it is not the specific instructions, directions, or expectations of the constituency that should be leading, but rather the representative's own knowledge and judgment about the proper course of action. In other words, the representative ought not to uncritically echo the constituents' preordained opinions in the political bodies (*delegate representation*), but rather must be an autonomous representative who employs his own mature judgment and enlightened conscience in deciding what is best for the nation: a *trustee*. The trustee representative is thus "trusted" with the responsibility to make the right decisions in any political circumstances that may arise, and this trust is buttressed by his (alleged) superior knowledge, character, and judgment capacities. The delegate representative, on the other hand, is not so much trusted for making good decisions himself, but is rather a puppet of the electorate, meant only to carry out the explicit instructions "delegated" to him by his constituents.<sup>221</sup>

The trusteeship-type of representation thus clearly emphasizes the capacities of the representative himself and his wide discretion in deciding on the content of representation. The trustee's discretion includes the freedom to focus on what he thinks are the objective interests of his constituents, which may differ from how the constituents perceive their own interests themselves. Trustee representation implies that the trustee may choose to not follow the preferences of his constituents and pursue a

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<sup>219</sup> Rudolf Boon, *Een Progressieve Conservatief: Edmund Burke als Tijdgenoot* (Soesterberg: Uitgeverij Aspekt, 2004).

<sup>220</sup> Edmund Burke, "Mr. Edmund Burke's Speech to the Electors of Bristol," in *Select Works of Edmund Burke: Miscellaneous Writings (Vol. IV)*, ed. Francis Canavan (Indianapolis: Liberty Fund, 1999/1774), 5–13.

<sup>221</sup> Delegate representatives have also been compared to servants, mirrors, megaphones, envelopes, tools, limbs, mouthpieces, typewriters, and telephones. Pitkin, *The Concept of Representation*, 146–147, 151–152; Feinberg, "The Rights of Animals and Unborn Generations," 47.

different course of action instead (such as one that would be in the interests of the nation as a whole). Trustee representation does not, however, necessarily imply that the opinions and preferences of the constituency have no role to play. Burke considered it not only reasonable, but imperative that a representative is informed by the “weighty and respectable opinion” of his constituents, an opinion “which a Representative ought always to rejoice to hear; and which he ought always most seriously to consider.”<sup>222</sup> He, however, also makes it clear that even though these weighty and respectable opinions must be taken into account, they cannot have a significant restricting effect on the autonomous decision of the representative. The trustee weighs the wishes of the constituents on his own and to the best of his abilities. The idea that constituents should be able to issue mandates which the representative is bound to blindly obey, vote for, and argue for is dismissed by Burke.<sup>223</sup> Burke put this philosophical position into practice as well, which eventually cost him dearly. In 1778, as a member of the British Parliament for the district of Bristol, Burke actually acted contrary to the explicit wishes of his constituents. The Bristolians could have known what was coming for them. Burke, in his inaugural speech in 1774, had warned them that he would not be a “flatterer” and that he would be prepared to act against the opinions of the Bristolians if he thought the general good of the rest of the British community demanded it.<sup>224</sup> And so it happened that Burke voted contrary to the explicit wishes of his Bristolian constituents, in a matter concerning trading regulations with Ireland. After this affair, Burke became so unpopular that he did not stand a chance of being re-elected for the same district in 1780.<sup>225</sup> In a speech in the House, Burke commented on this matter as being “an example to future representatives of the Commons

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<sup>222</sup> Burke, “Speech to the Electors of Bristol,” 10–11.

<sup>223</sup> Burke, “Speech to the Electors of Bristol,” 11.

<sup>224</sup> Burke, “Speech to the Electors of Bristol,” 11–12.

<sup>225</sup> However, Burke accepted a safe seat and became representative for the district of Malton. He held this seat from 1780 to 1794. Francis Canavan, “Speech to the Electors of Bristol,” in *Select Works of Edmund Burke: Miscellaneous Writings (Vol. IV)*, ed. Francis Canavan (Indianapolis: Liberty Fund, 1999/1774), 3–4.

of England, that one man at least has dared to resist the desires of his constituents when his judgment assured him that they were wrong."<sup>226</sup>

As illustrated by this example, the practical viability of Burkean trustee representation in the real world is questionable (when applied to humans, that is). John Stuart Mill, also a supporter of the trustee model of representation, warned in 1861 that the viability of the trustee model depends heavily on what he called the "constitutional morality" of the electorate.<sup>227</sup> If voters do not elect representatives based on their character and judgment capacities, but instead let themselves be seduced into voting for demagogues on account of their alluring but static political promises (in other words: delegate representatives), the trustee model does not stand a chance of persisting. With such a poor electoral attitude, trustees—like Burke—will lose their seats, and demagogues determined to get voted into parliament by telling the people what they want to hear but who lack the right judgement capacities will come to dominate politics instead. Mill predicted that without cultivation of the moral duty of electors to "choose educated representatives, and to defer to their opinions," the representative systems would eventually convert into ones of mere delegation. "As long as they [the electors] are ... free to vote as they like, they cannot be prevented from making their vote depend on any condition they think fit to annex to it. By refusing to elect any one who will not pledge himself to all their opinions, ... they can reduce their representative to their mere mouthpiece, or compel him in honour, when no longer willing to act in that capacity, to resign his seat. And since they have the power of doing this, the theory of the Constitution ought to suppose that they will wish to do it; since the very principle of constitutional government requires it to be assumed, that political power will be abused to promote the particular purposes of the holder." Hence, Mill predicted, "let the system of representation be what it may, it will be converted into one of mere delegation if the electors so choose."<sup>228</sup>

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<sup>226</sup> Charles MacFarlane, *The Cabinet History of England* (Vol. 19) (London: Charles Knight and Co., 1846), 61–62.

<sup>227</sup> Mill, "Considerations on Representative Government," 504–505.

<sup>228</sup> Mill, "Considerations on Representative Government," 504–505, 512.

It seems Mill's prophecy came true. Current-day liberal democracies seem to bear more resemblance to the delegate model of representation than to the trustee model of representation. Instead of electing representatives on account of their superior knowledge and judgment capacities, the alternative delegate "character of mind" seems to be omnipresent among the electorate in current-day liberal democracies. It is the attitude in which the electorate does not particularly look up to representatives, but sees them more as tools that can be used to get its pre-established opinions replicated in the political institutions. Mill illustrated this mind-set as follows: "[it is the character of mind] which thinks no other person's opinion much better than its own, or nearly so good as that of a hundred or a thousand persons like itself. Where this is the turn of mind of the electors, they will elect no one who is not, or at least who does not profess to be, the image of their own sentiments, and will continue him no longer than while he reflects those sentiments in his conduct."<sup>229</sup> It almost seems like Mill was describing the electorate of twenty-first century liberal democracies.<sup>230</sup> Apparently, trustee-like representation is not what people are looking for—or at least not voting for. However, despite the unpopularity of the trusteeship idea today, Burke's trustee concept is highly relevant in the context of *animal* representation. It may function as a theoretical foundation for the preferred role of animal representatives.

It must be noted that Burke did not devote a single word to non-human animals in the speech that became his classic exposé on trusteeship representation.<sup>231</sup> Nor can he, to the best of my knowledge, be linked in any other way to an animal-friendly philosophical outlook—which is not surprising considering that Burke lived in the eighteenth century.<sup>232</sup> Jeremy

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<sup>229</sup> Mill, "Considerations on Representative Government," 508.

<sup>230</sup> As an advocate of accessible education, John Stuart Mill could only have dreamed of the highly educated electorates and the high level of accessibility of information that democracies have today. It is interesting to contemplate the question of whether Mill would still be an advocate of the trustee type of representation if he could have foreseen how well-educated the electorate, and how accessible information would be in the twenty-first century.

<sup>231</sup> Burke, "Speech to the Electors of Bristol," 5–13.

<sup>232</sup> Burke addresses animals in *A Philosophical Enquiry into the Origin of Our Ideas of the Sublime and the Beautiful*, but non-human animals did not become a coherent part of his political philosophy. Edmund Burke, *A Philosophical Enquiry into the Origin of Our Ideas of the Sublime and the Beautiful*, ed. Paul Guyer (Oxford: Oxford University Press, 2015).

Bentham was, in that sense, quite an exception and far ahead of his time for publishing on the moral status of non-human animals as early as the eighteenth century. Considering the foregoing, it seems reasonable to assume that Burke did not have any intention of including non-human animal representation in his concept of trustee representation. However, with its emphasis on the autonomous judgment of the representative, Burkean trustee representation seems to offer an interesting solution to the earlier discussed problem that non-human animals typically cannot instruct their representatives on the content of their representation. The trustee model of representation, with its focus on the independent and informed judgment of the representative to discover the true interests of his principals, is thus particularly suitable for animal representation.<sup>233</sup> Trustee representation creates an opportunity of representing the interests of individuals who cannot represent these interests themselves, nor form or explicate political preferences. The fact that non-human animals are unable to join in the mentally demanding game of politics thus does not need to mean that they are doomed to be ignored in the political sphere, if only human trustees can make political decisions and judgments on their behalf.

### *Paternalism*

One issue regarding trustee representation remains to be addressed, however. Political trustee representation and political guardianship (terms that are used interchangeably in this book) have often been criticized on the ground that such types of representation are too paternalistic for modern liberal democratic standards. Democrats, especially liberal ones, are obviously wary of paternalism. For apart from possibly having positive effects, paternalism is also a potential threat to the autonomy and freedom of the individual being taken care of. It is clear that guardian-like types of representation have a strong inherent element of paternalism, and since there is a fine line between rightfully administered paternalism and unwarrantedly taking away someone's freedom to make choices for themselves and to behave in their own way, the acceptability of trustee-like

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<sup>233</sup> Smith, *Governing Animals*, 103–106. See also: Cochrane, *Sentientist Politics*, 46–47.

animal representation with regard to paternalism must be addressed before we can advocate this type of representation for non-human animals.

How dangerous paternalism can be to individual freedom and autonomy is immediately apparent when we consider the world's disastrous historical applications and misuses of the guardianship idea. Many authoritarian regimes, such as those of Vladimir Lenin (1870–1924) and Mao Zedong (1893–1976) have appealed to the idea of guardianship by maintaining that a strong guardian of superior knowledge, character, and virtue is needed to bring about the general good. The track record of guardianship types of governance in the real world thus gives rise to quite some suspicion with regard to the guardianship concept.<sup>234</sup> The fact that authoritarian leaders have tried to base their legitimacy in the guardianship model is, in other words, a serious negative indication for adopting such a model, and this real-world experience should at the very least stimulate us to find ways to prevent such abuses of power in possible future applications of the guardianship model. However, it must be said that virtually every theoretical political model has been abused by power-hungry leaders in the real world, and such historical misuses alone cannot be decisive in disqualifying a theoretical political model altogether.<sup>235</sup> Real-world failures are not absolute proof of the normative deficiency of a theoretical model, for real-world failures may be caused by mistakes in the practical translation of the theoretical idea. In the case of the guardianship idea, the primary reason for the failure of its real-world application seems to be that paternalism was administered over perfectly politically competent people. Furthermore, adequate institutional protections against abuse of power by the “guardian” were lacking. We must learn lessons from these mistakes if we are to seriously consider introducing guardian-like representation for non-human animals.

It must be clarified at this point that this book in no way seeks the revival of political guardian representation of humans. The only context in which guardian representation is considered possibly relevant is that of non-human animal representation. What is being investigated are merely the

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<sup>234</sup> Dahl, *Democracy and Its Critics*, 52–55, 63–64, 77.

<sup>235</sup> Dahl, *Democracy and Its Critics*, 52, 63.

options of offering guardian-like political representation of non-human animals; the political representation of humans remains unaffected in the sense that human constituents' ability to determine the content of their representation is fully accepted. Because of this limited application of the guardianship idea, the two most important criticisms of guardianship representation are beside the point, since these concern application of the guardianship idea to humans. The criticisms are that, first, guardianship governance forecloses active political engagement of ordinary humans, and second, that the concept of guardianship governance is based on the dubious premise that ordinary humans are politically incompetent. Both do not affect the proposal here, since they specifically concern political guardianship over humans. The only claim on which the non-human application of the guardianship model rests, and which is defended, is that non-human animals generally lack the competences needed to politically represent themselves and to instruct human representatives on the content of their representation. This claim has been extensively defended in this book. The latter criticism, regarding the underestimation of humans' political competency, thus is beside the point in the context of non-human animal representation. The other criticism, that guardianship governance obstructs democratic engagement, also misses the point in the context of non-human animal representation. In their case, guardianship representation does not foreclose active democratic engagement—after all, this was already impossible to begin with—rather, guardianship representation *opens up* options for (passive) democratic engagement that non-human animals otherwise would never have.

Non-human animal guardian representation thus does not have the same principled problems that human guardianship representation does. This is not the same as saying that any type of guardian representation is permitted, however. Even if guardian-like representation of non-human animals is in principle allowed, we must still be on the lookout for illegitimate forms of paternalism which may ultimately result in abuse of power by the trustee. Generally, there seem to be two cumulative requirements in order to consider paternalistic rule to be legitimate. First, it must be beyond doubt that the “pater” (political trustee) is the better judge

of the interests of the principal. Second, the “pater” may only utilize his power in the interest of the principal.

The first requirement, which prescribes that the trustee must be the better judge of the principal’s interests, is almost automatically met if non-human animals are represented by human trustees. On account of their previously discussed superior knowledge of the world, human agents are almost always the better judge of the interests of other animals. Precisely because non-human animals are fundamentally uninformed about the world, helping them in determining and protecting their true objective interests is a typical kind of justified paternalism.<sup>236</sup> It is the type of paternalism that is particularly welcome in a liberal democratic society. Taking care of other animals in this sense is legitimate paternalism, similar to keeping human babies alive or deciding for a child that it is best to be vaccinated because it is in his best interest. The child does not have the relevant information or the intellectual skills to make such complex decisions for himself. On account of their fundamental uninformedness, taking care of non-human animals by filtering out their preferences that run counter their own objective interests is a legitimate kind of paternalism that can safely be practiced by political animal trustees.

The second requirement, which prescribes that the trustee may only utilize his power in the interest of his principal, is more challenging. This requirement is intended to prevent abuse of power, but as our experience with real-world applications of the guardianship model demonstrates, it is not easy to make guardians act incorruptibly. The guardianship model has an inherent danger of the corruption and abuse of power by the guardian, and it is thus of pivotal importance to bolster any application of this model with an adequate protection against abuse of power by the political animal trustee. Political animal trusteeship hence can only be a serious contender for politically institutionalizing animals’ consideration right if it is surrounded by institutional safeguards that can prevent animal trustees from abusing their powers in authoritarian Leninist and Maoist ways. Since there seems to be no other option than exercising a form of paternalism over

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<sup>236</sup> Goodin, *Reflective Democracy*, 54–55.

animals if we are to politically institutionalize their consideration right, the next challenge is controlling the risk of abuse of power. We must, in other words, find a way of ensuring that animal trustees use their political power for the right ends: the interests of animals. Whether the risks of abuse of power can be kept in check and how this can be done will be discussed in the next subparagraph.

### *III. Abuse of power*

An important obstacle in realizing political animal representation is the difficulty of minimizing the risk of abuse of power. All political systems contain an inherent risk that power will be abused, and democracy is no exception to this rule. Great philosophers have warned us of this time and again. John Stuart Mill pointed out that it must be assumed “that political power will be abused to promote the particular purposes of the holder; not because it always is so, but because such is the natural tendency of things, to guard against which is the especial use of free institutions.”<sup>237</sup> And, as Mill also pointed out: “Although the actions of rulers are by no means wholly determined by their selfish interests, it is chiefly as a security against those selfish interests that constitutional checks are required.”<sup>238</sup> In yet another work, Mill once again stressed the importance that “laws and institutions require to be adapted, not to good men, but to bad.”<sup>239</sup> Karl Popper similarly held that “It is reasonable to adopt, in politics, the principle of preparing for the worst, as well as we can, though we should, of course, at the same time try to obtain the best. It appears to me madness to base all our political efforts upon the faint hope that we shall be successful in obtaining excellent, or even competent, rulers. ... Rulers have rarely been above the average, either morally or intellectually, and often below it.”<sup>240</sup> In addition, James Mill thought it a “law of nature, that a man, if able, will take from others any thing which they have and he desires.” To suppose that a person (in power)

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<sup>237</sup> Mill, “Considerations on Representative Government,” 505.

<sup>238</sup> John Stuart Mill, *The Logic of the Moral Sciences* (London: Gerald Duckworth & Co. Ltd., 1988/1843), 80.

<sup>239</sup> John Stuart Mill, “The Subjection of Women,” in *On Liberty and Other Writings*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989/1869), 151.

<sup>240</sup> Popper, *The Open Society and Its Enemies* (Vol. I), 121–123.

will *not* take from every man what he pleases is, according to Mill, “to affirm that Government is unnecessary” because it would assume that human beings will abstain from injuring one another of their own accord.<sup>241</sup>

Assuming that, if left uncorrected, political power might be used to serve a ruler’s own ends instead of the legitimate ends for which power has been bestowed on him seems imperative for drawing up any responsible institutional proposal.<sup>242</sup>

Abuse of power can take many shapes, and we must be aware of the different types of abuse if institutions are to be guarded against it. In its mildest version, power may be used for the wrong ends if representatives genuinely misinterpret the preferences of the human agents they ought to represent or if they genuinely misunderstand the interests of the political patients they ought to represent. Representation typically requires interpretation and translation of interests and preferences, and it is a known fact that many things can get lost in interpretation and translation. In the mildest form of this problem, the representative makes a genuine mistake that, though without intention, has the effect of disrespecting the preferences and interests of the represented. Because of the lack of intention here, it may be more accurate to call this unfortunate exercise of power *misuse of power* rather than abuse of power. In the worst version of abuse of power, power is intentionally abused by a representative to violate the (moral and/or legal) rights of the ones subjected to that power in order to serve other, illegitimate ends. Between this excessive abuse of power and unintentional misuse of power, many intermediate forms of abuse of power are possible, all of which ought to be prevented to the greatest extent possible.

Given the fact that abuse of power in all its forms is always lurking around the corner, any proposed adjustment to the institutional arrangements of a liberal democracy must keep a strict eye on preventing it. In designing institutional adjustments to give effect to the consideration right of non-human animals, we must therefore carefully address this issue of how to prevent abuse (or misuse) of power from happening.

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<sup>241</sup> Mill, “Government,” 8, 17.

<sup>242</sup> This is not the same as assuming that *all* people are corruptible. The mere assumption here is that, like any other person in a democracy, *a* corruptible person can obtain a powerful position.

*Animals' susceptibility to abuse of power*

For several reasons, non-human animals are especially vulnerable to falling victim to abuse of power by their representatives. To begin with, we have seen that a trustee type of representation is the only option for non-human animal representation, and given its paternalistic character, this option comes with greater risks of abuse of power. A trustee is typically assigned extensive interpreting and translating powers in order to be able to determine the content of representation, and he has the power to divert from and overrule the expressed preferences of the principal, without the principal being able to correct the trustee. These circumstances typical to guardianship representation give an animal trustee a lot of power and make non-human animals particularly vulnerable to falling prey to abuse of power.

The second circumstance typical to non-human animal representation that makes abuse of power more likely is the fact that the earlier-mentioned identity of interests between the representatives and the represented is almost entirely lacking. It has been discussed earlier in this book that it was James Mill's insight that the interests of the representatives and those of the represented have to be largely similar in order to reduce the risk of abuse of power significantly. This is because, and I again echo James Mill here, "the Community cannot have an interest opposite to its interest."<sup>243</sup> If the interests of the representative and his constituency are largely similar, a representative will almost automatically act in the interests of his constituency, because it is also in his own interests to act in that particular way. However, as also discussed earlier, non-human animals have few interests that overlap with those of their human representatives. To the contrary, human and non-human interests very often conflict, and are sometimes even mutually exclusive. The Millian identity of interests is, in other words, largely absent, which means that there is little reason to expect that representatives will automatically act in the interests of non-human animals and use their powers for this legitimate end. This renders non-human animals particularly vulnerable to abuse of power by their human

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<sup>243</sup> Mill, "Government," 7.

representatives, since the institutional circumstance that should make representatives more likely to use their powers for the right cause is absent. There is no reason for despair yet, however, as Mill also taught us that if an identity of interests is naturally lacking, additional institutional mechanisms may function as an alternative inducement for using political power for the right ends instead.

The most obvious and proven mechanism of generally inducing representative rulers not to abuse their power is the mechanism of general periodic elections. General periodic elections minimize the risk of abuse of power by first pre-authorizing rulers and then holding them accountable for their political decisions afterwards. First, the people who will be ruled *authorize* representatives by assigning them their posts by means of general elections. This enables voters to authorize only those people who they trust and expect to represent them in a sincere way. Second, we make representatives *accountable* for their political behaviour by guaranteeing that abusers of power can be sent away in the next election. Periodic general elections, in other words, enable voters to get rid of the representatives who have shown to be of bad character or who have otherwise failed in representing their interests or political preferences. Combined, these mechanisms of authorization and accountability give human voters control over who is in power, and thus offers them two important instruments to prevent and end possible abuse of power by their representatives. Through these two mechanisms, risks of abuse of power can be reasonably contained, even if a natural identity of interests is lacking.

Crucially, however, these classic protections against abuse of power obviously are not applicable in the case of non-human animal representation, since non-human animals cannot exercise political agency, and thus cannot authorize representatives or hold them accountable by voting in general elections.<sup>244</sup> Only human agents with certain cognitive capacities seem to be able to take part in the complex processes of authorizing politicians and holding them accountable. Non-human animals cannot and will not vote, which makes authorizing representatives and

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<sup>244</sup> Smith, *Governing Animals*, 104–106.

holding them accountable in a classic sense impossible. As a consequence, they cannot exercise the control over their representatives that seems essential for combatting abuse of power. This is the third circumstance that contributes to making the risk of abuse of power at the expense of non-human animals dangerously high.

It follows from the foregoing reflections that, as a rule, non-human animals are extremely susceptible to abuse of power by their hypothetical human representatives. The circumstances or mechanisms that normally tend to curtail this risk are not apparent or not applicable in the context of animal representation. In short, the problems are that: (I) their political representation requires an atypical and—because of the paternalism involved—particularly risky form of trustee representation; (II) a natural form of identity of interests is lacking; and (III) the usual institutional mechanisms preventing abuse of power, authorization and accountability, are inapplicable because they require a level of political agency that non-human animals lack. The fact that non-human animals are highly vulnerable to abuse of power means that we must be extremely critical when it comes to judging animal representative frameworks on their aptitude of controlling the risk of abuse of power. We must, in other words, be close to certain that potentially corruptible humans have no institutional opportunities to abuse their power at the expense of non-human animals. With the classic mechanisms for controlling the risk of abuse of power out of reach, it seems that institutional protections against abuse of power must take a different form. It may be necessary to consider unconventional institutional arrangements in order to ascertain that political animal trustees will not, in James Mill's terms, make "mischievous use" of their power and turn it against non-human animals.

#### *Character selection strategies*

Karl Popper famously argued that "institutions are like fortresses. They must be well designed *and* manned" (*italics original*).<sup>245</sup> In contemplating how to design institutional arrangements which are meant to combat abuse

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<sup>245</sup> Popper, *The Open Society and Its Enemies* (Vol. I), 126.

of power, it is important to realize that combatting abuse of power does not only require that we design institutions in a clever way, but also that we attract the right people to man these institutions. Following this Popperian wisdom, we can distinguish between two types of strategies that can help to ensure that representatives behave in alignment with the interests of those who they are supposed to represent. On the one hand, there are what I call *institutional nudging strategies*, which focus on the design of institutions, and on the other hand there are what I call *character selection strategies*, which focus on manning these institutions with the right people. In discussing these two types of strategies and their potential to lower the risk of abuse of power by animal trustees, we may also learn from ideas that have been put forward in the context of the representation of future people, as they, too, would be typically vulnerable to abuse of power if they were to be politically represented.

Let us start with the *character selection strategies*, which concern the manning of institutions. These are strategies which can be used to establish a reliable level of alignment between the interests of the represented and the offered representation by selecting representatives on the basis of certain characteristics. Since non-human animals cannot elect representatives on their good character, we could consider establishing such alignment through institutionally screening candidates for the representative functions on the basis of their good intentions and genuine concern for the animals they would represent. Candidates must, in other words, have a suitable character and attitude for becoming a reliable animal trustee. Candidates must be screened in if they seem actually concerned about the interests of non-human animals and are likely to represent these in a sincere way and rejected if they seem less animal-friendly and sincere.

It could be suggested that an institutionalized selection of genuinely concerned candidates is not really necessary. In the context of future people representation, political theorists Iñigo González-Ricoy and Axel Gosseries have suggested that, to a certain extent, the selection of future-oriented candidates will naturally occur, likely because they think that primarily future-oriented people would naturally be interested in taking on the job of

representing future people.<sup>246</sup> Translated into the context of non-human animal representation, this could equally mean that candidates for animal representative positions need not be selected, because candidates genuinely interested in non-human animals will automatically present themselves.

Even though González-Ricoy and Gosseries's assumption is probably true to a certain extent—probably, *primarily* people with a genuine interest in animals would be interested—it would be irresponsible to gamble on the idea that only suitable candidates will present themselves. The assumption that the selection of animal-friendly representatives will naturally occur can, in other words, be disputed. It is possible that people with an insincere interest in animals (for example people who profit economically from activities which require animal exploitation), will also attempt to occupy such powerful positions for strategic reasons.<sup>247</sup> Becoming a formal representative of non-human animals could offer them a unique opportunity to acquire political power to further their own interests from that position. Considering the advice of father and son Mill and Karl Popper that we should prepare for the worst rulers, it does not suffice to simply assume that only sincere people will be drawn to the position of representing animals, and we must institutionally prepare for insincere people trying to become animal trustees for strategic reasons.

It thus seems wise to consider introducing character selection criteria which should filter out inadequate animal-trustee candidates. It is quite a challenge, however, to identify and select sincerely committed candidates. In the context of the representation future people, it has been suggested that certain personality traits and characteristics generally indicate a sincere and actual concern for future people, and that the representatives must be

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<sup>246</sup> Iñigo González-Ricoy and Axel Gosseries, "Designing Institutions for Future Generations: An Introduction," in *Institutions for Future Generations*, eds. Iñigo González-Ricoy and Axel Gosseries (Oxford: Oxford University Press, 2016), 9.

<sup>247</sup> A similar concern has been voiced in: Ekeli, "Giving a Voice to Posterity," 437. González-Ricoy and Gosseries recognize that there is a risk of strategic manipulation, oddly enough right before they express their confidence that "candidates will be informally screened for their future-friendliness, even if proxy requirements are not formally included." González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 9.

selected on those features.<sup>248</sup> Similarly, in the context of animal trustees, we could consider adopting formal requirements which should help us to select suitable candidates. But what features or characteristics can indicate such a sincere concern? In the context of the representation of future people, it has been suggested that being part of the “environmental sustainability lobby” may be an indication of genuine concern for the future, and that thus only such people qualify for becoming a representative of future people. This idea was put forward by political theorist Andrew Dobson (1957–), when confronted with the problem of aligning the representation of future people with their actual interests.<sup>249</sup> Dobson suggests that a proxy (substitute) electorate for future generations should be drawn from the present generation and that they should execute the functions of a normal electorate: providing and electing representatives (in this case for future generations). In discussing how to establish that these proxy members and representatives would indeed use their power to truly represent the interests of future generations, Dobson concludes that taking a random sample from the present generation might be too risky, because random citizens might give unreasonable priority to present generations’ interests. There would, in other words, be too high a risk of misuse or abuse of power if future generations’ representatives were randomly picked from the general public. Rather, Dobson maintains, a lobby that currently “has its eyes firmly fixed on the future” must be identified, and the people who constitute that lobby must be given the exclusive right of becoming candidates for future generations’ representatives.<sup>250</sup> Since the environmental sustainability lobby is used to thinking about the interests of future generations, Dobson considers them a suitable group from which to draw representatives of future generations. It remains unclear, however, how we can identify the

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<sup>248</sup> Thompson, “Representing Future Generations,” 33–34; Dobson, “Representative Democracy and the Environment,” 132–133; Philippe van Parijs, “The Disfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice,” *Philosophy & Public Affairs* 27, no. 4 (Autumn 1998): 308–314; Juliana Bidadanure, “Youth Quotas, Diversity, and Long-Termism: Can Young People Act as Proxies for Future Generations?” in *Institutions for Future Generations*, eds. Iñigo González-Ricoy and Axel Gosseries (Oxford: Oxford University Press, 2016), 266–281; Ekel, “Giving a Voice to Posterity,” 438.

<sup>249</sup> Dobson, “Representative Democracy and the Environment,” 132–133.

<sup>250</sup> Dobson, “Representative Democracy and the Environment,” 132–133.

people who constitute the “environmental sustainability lobby.” Dobson reluctantly notes that it is “admittedly hard to pin down” such a lobby and the people who constitute it, but offers no further instructions on how to practically find and select the people invested in environmental sustainability.<sup>251</sup>

In an interpretation of Dobson’s work, philosopher Kristian Skagen Ekeli suggests that such a lobby may consist of people who are a member of an environmental group or organization.<sup>252</sup> Being such a member seems to be a clear indication of having sincere concern for the future. Other features have also been suggested to indicate a certain genuine involvement in the future and the people in it. Being a parent, and thus being genuinely concerned about the future of your children, may be such a feature.<sup>253</sup> Alternatively, being young may indicate a genuine involvement in the future, for young people have to deal with a relatively big part of the future themselves.<sup>254</sup>

In the case of animal trustees, comparable features which may indicate a certain genuine concern with non-human animals could be: being a member of an animal rights or welfare group or organization or having a track record of animal-friendly behaviour in the past, such as having done voluntary work in an animal shelter or having (had) a profession which is conducive to animal welfare, such as veterinarian. The assumption then is that being prepared to invest time and energy in improving the welfare of animals indicates a genuine concern for animals. Apart from positive indications, negative indications may also be taken into account. The feature of being convicted of animal abuse in the past may be taken as an indication of having disregard for animals. Similarly, having (had) a profession which (often) involves harming animals, such as that of animal farmer and butcher, may be reason to be screened out as a candidate for becoming an animal

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<sup>251</sup> Dobson, “Representative Democracy and the Environment,” 133. See also: Cochrane, *Sentientist Politics*, 48.

<sup>252</sup> Ekeli, “Giving a Voice to Posterity,” 435–437. Ekeli himself rejects the idea that the right to represent future generations should be restricted to environmental organizations and their members.

<sup>253</sup> Van Parijs, “The Disfranchisement of the Elderly,” 308–314; Thompson, “Representing Future Generations,” 33.

<sup>254</sup> Bidadanure, “Youth Quotas, Diversity, and Long-Termism,” 266–281; Thompson, “Representing Future Generations,” 33.

representative, for this may also indicate inattentiveness to animal welfare. Accepting people who meet the positive quality criteria and rejecting people who meet the negative quality criteria may contribute to preventing abuse of power of animal representatives.

The effectiveness of this character selection strategy based on formal quality criteria is questionable, however. It can be questioned whether formal quality requirements for candidate representatives would be successful in screening out indisputably unsuitable candidates, and thus whether they could establish sufficient protection against abuse of power.<sup>255</sup> Even people who check the aforementioned boxes (being a member of an animal rights group, having been a volunteer in an animal shelter, having no track record of animal abuse, etc.) are not necessarily reliable animal representatives who will not abuse their power. Before selection criteria can constitute a reliable protection against abuse of power, the assumptions that underlie these various selection criteria must be proven to be valid. Assumptions such as “people with children are more likely to think and act in a future-friendly way” have to be checked on their validity against empirical evidence.<sup>256</sup> The opposite could be just as true: possibly, caring about future people correlates with having no children at all, because overpopulation is likely to become a big problem for future people. Empirical backup is needed before we can count on selection criteria to screen out people with unfit attitudes for becoming an animal representative. We cannot just assume that, for example, veterinarians have more genuine concern for animal welfare than farmers and that they are thus more likely to be suitable animal representatives. Given the high risk of abuse of power, what is needed is something close to certainty about these factors, and without evidence on the underlying correlations, we cannot be certain that the criteria which rely on them will select the right people for the job.

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<sup>255</sup> If power *itself* truly corrupts, the whole idea of selecting people on the suitability of their characters would be futile. In that case, the act of assigning a person political power would bring out the worst in people, even in those people who initially seemed to have the perfect character for becoming a representative. Periodical screening might then be imperative.

<sup>256</sup> González-Ricoy and Gosseries, “Designing Institutions for Future Generations,” 9.

Furthermore, the effectiveness of formal quality criteria is dubitable because even if the features mentioned are proven to *generally* indicate a genuine concern for non-human animals, this is no guarantee that *every* person who meets the criteria will have the required character for becoming an animal trustee. Indications of having a suitable character for becoming an animal trustee are nothing more than that: mere indications. A verified correlation between feature X and a genuine concern for animals can only serve to indicate a likelihood that X-people are animal-friendly, but obviously atypical X-people also exist. In other words, even if veterinarians are generally likely to have a genuine concern for the welfare of non-human animals, this does not mean that every veterinarian has this genuine concern. There may still be veterinarians around who could not care less about the welfare of non-human animals, and given the advice of Popper and both Mills, we have to institutionally prepare for precisely these atypical veterinarians trying to become an animal trustee. If the character selection strategies are to constitute a significant protection against abuse of power, they must be able to screen precisely these people out as candidate representatives for non-human animals. Since the discussed character selection criteria are unable to do so, they do not seem, on their own, to constitute sufficiently reliable protection against abuse of power.

Apart from their doubtful effectiveness in preventing abuse of power on their own, there seem to be additional problems with introducing character selection criteria for candidate representatives. It can be questioned whether selecting people on account of having certain features is desirable from a more principled point of view, even if it were effective in preventing abuse of power. Kristian Skagen Ekeli has pointed out that selection criteria are sometimes unintentionally more selective than they seem.<sup>257</sup> They may not only select for the intended feature, but unintentionally also select for certain more substantive points of view if these views correlate with the selected feature. With regard to Dobson's proposal to merely select people from the environmental sustainability lobby to become future people's representatives, Ekeli points out that this

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<sup>257</sup> Ekeli, "Giving a Voice to Posterity," 435–437.

selection criterion might not only select for the desired characteristic of caring about the future, but simultaneously and unintendedly also for more substantial views on *how* the interests of future people are best met.<sup>258</sup> In this case, it is likely that the selection criterion unintentionally selects only people who are of the opinion that future generations' interests are best met through preserving nature for upcoming generations. This is because being a member of an environmental organization is not only likely to correlate with having concern for the future, but also with having the substantial view that nature must be protected and preserved. However, it is not at all certain that preserving nature for future people is the best way of meeting their interests. As Ekeli points out, technological optimists might claim that it is not nature preservation that serves the interests of future people best but investing in technological development.<sup>259</sup> Technological optimists might argue that investing in, for example, the development of genetically modified crops is the best way of meeting future people's interests, because they will face great challenges in meeting their nutritional needs due to climate change and the rise of the world population. Ironically, investing in genetic modification is something of which environmental organizations generally disapprove. Hence, if only people from environmental organizations are eligible to become representatives of future people, the viewpoint of technological optimists is likely to remain unheard. The selection criterion that singles out people from environmental organizations thus unintendedly makes substantial choices *for* preserving nature and *against* technological development, while it is not at all certain which of these would serve the interests of future people best. Ekeli points out that this constitutes a democratic problem, for by giving one particular group with a restricted range of perspectives the exclusive right to determine what best serves the interests of future people (or, in our context, animals), an open public debate on these matters is frustrated.<sup>260</sup> Selection criteria thus indirectly cause one particular substantial view to be granted the status of "truth," without there having been any proper pluralistic debate in which all different views were

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<sup>258</sup> Ekeli, "Giving a Voice to Posterity," 436.

<sup>259</sup> Ekeli, "Giving a Voice to Posterity," 436.

<sup>260</sup> Ekeli, "Giving a Voice to Posterity," 435–437.

heard. Since the interests of animals are not easily identified, and since they certainly are no “truth” only knowable to veterinarians and members of animal rights groups, the questions of what their interests are and which policies can best serve them are best either pluralistically debated and answered in open societal debate or answered by those who have the most credible claim to knowing these “truths”: scientific experts in disciplines relating to animal interests.

It must be added here that this book takes this democratic critique as not only affecting the discussed criterion of Dobson but character selection criteria in general, because all features for which criteria can select run the risk of having hidden correlations with substantive world views. Ekeli himself, however, directs his critique specifically at Dobson’s criterion (that selects people from the environmental sustainability lobby), without losing faith in character selection criteria in general. Ekeli even tries to come up with a better alternative for selecting suitable representatives for future people. He argues for introducing “legal norms” which merely allow people who “in fact *care* for the welfare of future people” to become a guardian (*italics original*).<sup>261</sup> In order to not undermine his own democratic critique on Dobson’s criterion, Ekeli argues that these norms should be “inclusive, in the sense that they should not place restrictions on the variety of viewpoints about what best serves the interests and needs of posterity.”<sup>262</sup> But *how* we can select people who “care” about future people without becoming non-inclusive with regard to substantive viewpoints is not elucidated by Ekeli. In a footnote, he admits that “it can be complicated to specify the content of such laws in an adequate way, and it is likely that controversies will arise. Therefore,” Ekeli maintains, “this is a matter that should be placed in the hands of democratically elected legislators.”<sup>263</sup> This, however, merely seems to push the problem around—possibly a symptom of the fact that it is wholly impossible to simultaneously select people who truly “care,” without accidentally excluding more substantial views from the debate. As a

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<sup>261</sup> Ekeli, “Giving a Voice to Posterity,” 437–438.

<sup>262</sup> Ekeli, “Giving a Voice to Posterity,” 437–438.

<sup>263</sup> Ekeli, “Giving a Voice to Posterity,” 438 (footnote 11).

suggestion for the legislator, Ekeli proposes that “certain powerful organized interest groups, such as labor unions and employers’ federations” should be excluded from becoming representatives of future people.<sup>264</sup> It is not at all clear, however, how this can be an acceptable solution. After all, this move is likely to also (unintentionally) exclude particular substantial views from the democratic debate.

### *Institutional nudging strategies*

The second option that may improve the alignment between the behaviour of representatives and the interests of non-human animals is introducing *institutional nudging strategies*. The attention is then not focused on selecting people of a certain character but on employing external nudges (positive and negative institutionalized sanctions) which ought to cause the necessary alignment. Such nudging mechanisms should encourage representatives to promote or adopt policies that align with the interests or preferences of the individuals they ought to represent. It will become clear, however, that it is quite hard to come up with an institutional nudging mechanism that can make animal trustees act in alignment with the interests of the animals they ought to represent.

The most prominent nudging mechanism in our current human democracies are the earlier-discussed general elections. General elections align the behaviour of representatives with the preferences and interests of the electorate. Being (re-)elected to a representative position (*authorization*) functions as a positive sanction for presenting good plans or having shown good political behaviour (in the sense that it aligns with the preferences of the constituency), and not being elected again (*accountability*) functions as a negative sanction for not delivering the wanted political behaviour (recall how Edmund Burke was sent packing when he refused to follow the wishes

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<sup>264</sup> It is also remarkable that Ekeli seems to have quite some faith in the legislator to find a way to establish the proposed reform, which should exclude, among others, “powerful organized interest groups,” considering that only a moment before, he states that: “democratic decisions often reflect the outcomes of political bargaining processes where powerful organized interest groups (such as labor unions and employers’ federations) play an important role” and that “it is difficult to achieve the necessary ... political support for effective environmental reforms.” Ekeli, “Giving a Voice to Posterity,” 431–432, 438.

of his Bristolian constituents). It has already been pointed out, however, that non-human animals cannot make use of this proven institutional nudging mechanism meant to prevent abuse of power, since they cannot participate in general elections.

The strong nudging effect that general elections have on politicians' behaviour—aligning it with the wishes and interests of the electorate—seems to result in having to decide against popular election as a way of selecting *animal* representatives and as a way of holding them accountable. If animal representatives were elected via general elections, there would be too strong incentives for the animal representatives to be responsive to the electorate consisting of only human agents, instead of being responsive to non-human animals. Since only humans would be able to vote for them again, it would be extremely appealing for animal trustees to ignore all interests and values that are not directly shared by the human electorate. Animal representation would then still be contingent on human clemency. A general election of animal representatives is thus likely to increase rather than decrease human-biased political behaviour, which is obviously not conducive to sincere animal representation.

However, there seem to be some options for relaxing some of the anthropocentric pressure on animal representatives if they were to be elected by the general public. Ekeli has pointed out that the pressure on the representatives of future people to be responsive to the presently living can be reduced if they could only serve one term, and thus would not be eligible for re-election as either ordinary representatives or as the representatives of future people.<sup>265</sup> A similar construction could lift some of the anthropocentric pressure off of animal representatives. A different option with a similar effect is giving animal representatives life-long appointments in that position after being elected by the general public. These institutional moves would make animal representatives more independent from the human electorate. The representative is then no longer dependent on human agents to have his term extended, which will make him freer to act in the interests of non-human animals, even if this runs counter to human interests.

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<sup>265</sup> Ekeli, "Giving a Voice to Posterity," 439–440; Stein, "Does the Constitutional and Democratic System Work," 440.

However, lessening the anthropocentric pressure on animal trustees obviously does not guarantee that they will act in the interests of non-human animals. Moreover, as Ekeli has also pointed out with regard to disabling the re-election of the representatives of future people, the consequence of this would be that the (animal) trustees would not be accountable to anyone.<sup>266</sup> This makes these options barely a better alternative from the perspective of preventing abuse of power. Furthermore, these moves would only relieve some but not all of the pressure representatives would feel to be responsive to the human electorate, since they merely affect the pressure caused by the retrospective accountability mechanism. However, in their prior authorization of an animal representative, the electorate is also likely to choose a candidate which they expect to serve their own interests best. The authorization nudge is not affected by this move of making re-election impossible. So even if the accountability mechanism were disabled, popular (s)election of animal representatives would still bring a high risk of abuse of power with it. It therefore seems wise to move away from the idea of popularly elected animal representatives, otherwise it is hard to guarantee that the animal representatives will not attach disproportionate weight to human interests and preferences and abuse the political power that was originally meant for representing non-human animals.

Now it may seem logical that decoupling the selection of animal representatives from popular election requires us to introduce new types of external institutional nudges which should encourage representatives to align their political choices with animals' interests. However, some thinkers have suggested that external institutional nudges and their corresponding sanctions are not necessary. Kimberly K. Smith has argued that it might be enough if political animal representatives act according to their internalized commitments, and are merely "accountable" to their own principles.<sup>267</sup> Additionally, Smith writes, we may rely on practices of "surrogate accountability." Smith argues that animal welfare organizations or animal

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<sup>266</sup> Ekeli, "Giving a Voice to Posterity," 439–440.

<sup>267</sup> Smith, *Governing Animals*, 113.

lovers may refuse to support or even publicly shame animal representatives who have, in their view, failed to adequately pursue animal welfare.<sup>268</sup> This should discourage representatives from abusing their power. Smith's option of "surrogate accountability" seems somewhat similar to what political philosopher Dennis F. Thompson (1940–) has suggested in the context of the representation of future people. Thompson argues that it is sufficient if representatives are merely accountable to the requirements of a role.<sup>269</sup> The role would "express the perspective of future citizens" (in this context, non-human animals) and the role requirements would "in effect stand as a surrogate for future citizens," Thompson explains.<sup>270</sup> The incentive to act in accordance with the interests of the represented party is then as subtle as the "conventional habit" of sticking to one's formal role, and, as in Smith's proposal, the nudge that should prevent representatives from abusing their power would not be a clear negative institutionalized sanction but rather a more subtle "social [dis]approval."<sup>271</sup>

A different possibility which has been proposed to better align the political behaviour of the representative with the interests of the represented without introducing institutionalized sanctions is improving the quality of deliberation among representatives.<sup>272</sup> It has been suggested that an improved deliberation process may allow representatives to be better informed about the interests of their principals and thus to improve the quality of the decisions made. In the context of the representation of future people, González-Ricoy and Gosseries argue that such extensive deliberation may also induce a "greater awareness of long-term problems and openness to act on the interests of future generations."<sup>273</sup> The same may be true for

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<sup>268</sup> Smith, *Governing Animals*, 112–113.

<sup>269</sup> Thompson, "Representing Future Generations," 17–37.

<sup>270</sup> Thompson, "Representing Future Generations," 28.

<sup>271</sup> Thompson, "Representing Future Generations," 29–30.

<sup>272</sup> In the context of the representation of future people: Ekeli, "Giving a Voice to Posterity," 429–450; Ekeli, "Constitutional Experiments," 440–461; González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 10.

<sup>273</sup> González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 10.

non-human animals, so it may ultimately benefit the alignment between the offered representation and the interests of non-human animals.<sup>274</sup>

These discussed options which do not involve institutional sanctions do not seem sufficient in combatting abuse of power, however. Even though commitments to a role or personal principles and improved deliberation may *allow* a better alignment to be achieved, they do not necessarily bring this about. These options are simply too permissive to constitute adequate mechanisms against abuse of power. Relying on representatives' commitments to a role or to internalized principles could only be effective in preventing abuse of power if there were institutional big sticks to enforce this commitment. In the proposals of Smith and Thompson, however, such institutional securities are lacking, which in effect means that if representatives were suddenly to shed their noble commitments, non-human animals would lose their representation and be left out in the cold. Recalling the ominous warnings of Popper and Mill Senior and Junior yet again, we know that non-binding commitments are clearly insufficient. Betting merely on deliberative improvements also seems insufficient, since this option, too, is much too permissive.<sup>275</sup> As González-Ricoy and Gosseries themselves point out: the alleged positive effects of improved deliberation are (among other things) dependent on whether the involved persons are sensitive to the weight of rational argument.<sup>276</sup> Furthermore, a sincere deliberation process also requires the participants to put aside self-interests.<sup>277</sup> Since it cannot be assured that people who are impervious to rational arguments or who are unable to put their self-interest aside will try to become animal representatives, improving deliberation can, on its own, not constitute sufficient protection against abuse of power. Furthermore, even if only people receptive to rational argument and able to put aside their

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<sup>274</sup> In the context of non-human animal representation, the usefulness of adopting deliberative mechanisms is assessed in: Robert Garner, "Animal Rights and the Deliberative Turn in Democratic Theory," *European Journal of Political Theory* (February 25, 2016): 1–21 [published online before print] and in: Garner, "Animals, Politics and Democracy," 103–117.

<sup>275</sup> See also: Cochrane, *Sentientist Politics*, 42–43.

<sup>276</sup> González-Ricoy and Gosseries, "Designing Institutions for Future Generations," 10.

<sup>277</sup> Garner, "Animals, Politics and Democracy," 107–109; Garner, "Animal Rights and the Deliberative Turn in Democratic Theory," 3.

self-interest were to present themselves as candidate representatives, deliberative mechanisms would still be insufficient in attaining the required alignment. Robert Garner has pointed out that more thorough deliberation obviously offers no guarantees with regard to substantial outcomes.<sup>278</sup> In other words, even if animal representatives were to deliberate in the most ideal circumstances, this would not automatically guarantee an outcome that would align with animals' interests.

A different option to improve this alignment, which does involve institutional sanctions, is to replace the accountability that a representative normally has to the electorate with accountability to a commission or some other organ. Animal representatives would then be answerable to a different organ and have to account for their political choices and behaviour before this organ. Such an organ may be authorized to correct the representative or even dismiss him from his professional duty if he has acted in a way that can hardly be perceived as representing non-human animals (this review can be either marginal or substantial). Through this method of negative institutional sanctioning, representatives can be "nudged into" aligning their political choices with the interests of non-human animals. In order for it to be a better alternative to accountability through general elections and for it to truly bring about the necessary level of alignment, it seems logical that the reviewing organ is composed of people who are truly invested in the objective interests of non-human animals. This seems to compel us to opt for selection criteria yet again, in order to rule out that strategic candidates will seize the positions to which representatives will be accountable. We have seen, however, that selection criteria give rise to numerous other problems, while at the same time failing to truly screen out unfit people. Therefore, it seems virtually impossible to establish new review organs of which the members are genuinely involved. There seems to be one other option, however.

Possibly, animal representatives could be made accountable to courts. Courts are arguably in the right position to check animal representatives on the representation they have offered, for judges are

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<sup>278</sup> Garner, "Animals, Politics and Democracy," 109–110; Garner, "Animal Rights and the Deliberative Turn in Democratic Theory," 11–16.

institutionally bound to (objective) legal principles, and they must rule without bias. In order to enable judicial review of animal representatives, there would have to be a legal instruction for animal representatives, compliance with which the courts can check. The permissibility of this legal basis would determine how substantial the courts' review would be. Somewhat simplified, there seem to be two alternatives. The first option is that the legal mandate for animal representatives is quite strict and thus not very permissive. They will be bound by a set of specific legal instructions on how to fulfil their role. In this case, it suffices if courts are offered relatively small reviewing powers which authorize them to only marginally check whether representatives have complied with these specific instructions. The second option is that the legal mandate for animal representatives is looser and thus quite permissive. They are then not bound by a set of specific instructions but merely by one general instruction, for example one which instructs them to "represent non-human animals." In this case, courts need relatively extensive reviewing powers which should authorize them to substantially check whether the political behaviour of animal representatives could reasonably be interpreted as having "represented non-human animals."

Both options seem to have serious problems, however. With regard to the first option, Ekeli has pointed out in the context of the representation of future people that it is as good as impossible to formulate adequate instructions and that, more fundamentally, it is also in principle undesirable to tie representatives to a set of highly restrictive rules.<sup>279</sup> Both objections also seem valid in the context of non-human animal representation. The unpredictability of future social circumstances and the complexity of animals' (mutually contradicting) interests makes it virtually impossible to formulate adequate detailed instructions for animal representatives in advance. Moreover, even if this were possible, the question of who would be the designated person or group of persons to determine what is generally in the best interests of animals, and thus who would formulate these instructions, still remains unanswered. This person or group of persons

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<sup>279</sup> Ekeli, "Giving a Voice to Posterity," 439.

would have to be a legitimate source, and it would, again, need to be established that they have no ulterior motives but to serve the objective interests of non-human animals. It seems that the legislative branch would be the only legitimate body to produce such instructions, but given the anthropocentric nudges which work on legislators, it would be unlikely that the instructions they produce would treat animal interests with the needed objectivity. In short, it thus seems not only impossible and undesirable to formulate a set of strict and adequate instructions for animal representatives; it also merely pushes the problem around because it requires that a new, reliable source for formulating these instructions is found.

The second option, in which representatives are not bound by a set of strict instructions but by one general instruction, is problematic in the light of the separation of powers. In this institutional constellation, courts would need to substantially check whether politicians have sufficiently and reasonably pursued the interests of non-human animals in their political behaviour. Such review would inevitably drag courts into a political swamp of normative values, ideological preferences, political choices, political style, and political trade-offs, from which a court can impossibly distil any objective and legal “truths.” In order to adequately determine whether an animal representative has sufficiently pursued the interests of animals, a court would have to undertake a substantial political examination and engage in highly political debates, things from which courts should stay well away—if not for the separation of powers, then certainly for the sake of maintaining an objective stature and reputation of independence. Additionally, this option, too, would not be a true solution, but would also merely push the problem around. In this case, the same problem we have encountered before comes back to haunt us again: what precisely are the interests of animals in a certain situation, and who is the designated party to establish this? In order to determine whether animal representatives have sufficiently pursued animals’ interests in their political behaviour, courts need to know what their interests were. A court, however, has no special claim to knowledge in this area. It may be suggested that a court may consult experts on such matters, but this again would be tricky, since then experts would become indirectly responsible for deciding highly political

matters. The (political) objectivity of these experts, however, is not necessarily guaranteed.<sup>280</sup> In short, the second option of binding animal representatives to a fairly permissive legal mandate must also be rejected on the grounds that it would require a form of political review by courts that is undesirable in light of the separation of powers and that it would again only push around the problem of finding a legitimate and objective source for determining animals' true interests.

Several strategies to mitigate the risk of abuse of power by animal representatives have been discussed, and although, of course, not all conceivable possibilities were integrally investigated, the provisional findings should alarm us. The most viable options for minimizing the risk of abuse of power have been explored, but none so far seems sufficient to establish an institutional constellation in which ill-intentioned, incompetent, or corruptible trustees can be prevented from doing damage to animal interests. Some of the examined character selection strategies and institutional nudging strategies have the potential of encouraging animal trustees to be more animal-friendly, but none can guarantee that animal trustees would be unable to make "mischievous use" of their power and use their position to seriously damage the interests of non-human animals. The fact that non-human animals are not political agents plays a crucial role in this, because it means that they themselves—the only ones who indisputably have their interests at heart—cannot play the reviewing role which is so essential to counteracting abuse of power. It seems that we have not yet found a way to institutionally rule out that animal trustees can abuse their power at the expense of non-human animals.

#### *IV. Distribution of political power*

A yet different challenge for political animal enfranchisement is determining how political power ought to be distributed among human representatives

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<sup>280</sup> In theory, it might be possible to create certain legal rules which ought to establish that experts who inform the judiciary have no political ties. However, whether this is possible is not further investigated here for the reason that the hypothetical type of judicial review discussed here is already dismissed for constituting a breach of the separation of powers.

on the one hand and animal trustees on the other. If animal trustees were to be introduced in the institutional constellations of liberal democracies, how much political power ought to be assigned to them? Or, more accurately, how much political power ought to be *transferred* from human representatives to non-human animal trustees? It seems that animal trustees can only be given political power by taking it away elsewhere. Assigning powers to animal trustees is thus essentially a matter of transferring political power from human representatives to animal trustees. Determining how much political power will need to be transferred appears to be quite a challenge, because on the one hand animal trustees will need sufficient power in order to be able to make a political fist for non-human animals, but on the other hand, animal trustees must not become so powerful that they can paralyze the representation of human citizens and nullify the valuable intellectual input of human representatives. Determining the right amount of political power to be transferred to animal trustees will be one of the fundamental challenges of enfranchising non-human animals in the political institutions.

In the context of this challenge, two objectives seem to be at play, neither of which must be jeopardized. The first is the objective of achieving a political consideration of animals' interests that is not contingent but institutionally secured. This objective seems to require that substantial political powers are available for animal trustees in order for them to not be politically nullified by human representatives. If human representatives have so much power that they can, in practice, negate the political input of animal trustees, then the consideration of non-human animal interests would not be institutionally safeguarded. Such a situation is undesirable in light of the non-contingency requirement, and thus has to be prevented. Animal trustees need sufficient political power in order to be able to politically combat institutions that represent humans, thereby putting actual flesh to the bones of the consideration right of animals. In general, the stronger and more powerful the institutions that represent animals will be, the smaller the chance that animal interests will be unjustly disregarded.

The second objective that must not be jeopardized is continued respect for the political input of human citizens. Even though it is important

that non-human animal consideration is not wholly contingent in a democracy, it is also not desirable to give animal trustees such strong political powers that the democratic process no longer gives due consideration to human interests and preferences. The intent of injecting animal interests into the democratic institutions is to enable a fair political weighing of all interests, and this not only implies the absence of institutionalized discrimination against non-human animals, but also the absence of institutionalized discrimination against humans. We must thus be careful not to sacrifice humans' political input for the sake of establishing non-human animal representation.

Now that the two objectives at play are defined, the difficulty of finding a balance between the political powers of human representatives on the one hand and animal trustees on the other becomes clear. It was pointed out that assigning political power to animal trustees necessarily comes at the expense of the political strength of institutions that represent humans, for political power is taken away from them. Assigning animal trustees substantial political powers in order to secure a non-contingent consideration of animals' interests may thus, in theory, lead to a situation where human preferences or interests will be unjustly neglected, because the institutions defending them are weakened and may not have enough power left to defend their cause. The theoretical challenge at hand is thus to find a balance between, on the one hand, the power granted to the political bodies responsible for representing humans, and on the other hand, the power granted to the political bodies responsible for representing non-human animals, while also respecting both groups' democratic right to be non-contingently represented.

One likely objection must be addressed at this point. It may be argued that the risk of humans becoming politically victimized by the introduction of powerful animal representatives is, in practice, not really a risk at all. It may be argued that it is extremely unlikely that animal trustees, who are humans, after all, will become so passionate about politically defending non-human animals that they will disregard human interests and preferences in the process. This seems to be merely a theoretical, not an actual risk, critics may argue. After all, it has been pointed out that it will be

hard to find and select animal trustees who will genuinely act in the interests of animals. This makes it unlikely that they, as humans, will choose to side with non-human animals instead of humans if it comes down to it. How is this objection to be appreciated? Even though there is some truth in this objection in the sense that this risk indeed would probably be quite small, it would not be wise to make no institutional efforts to mitigate this small risk—which is a risk, after all. The fact that it may be hard to find and select sincerely dedicated animal trustees does not automatically mean that no such people will become animal trustees. It is still possible that a person who is highly passionate about animal welfare will become an animal trustee and that he will, if the possibility presents itself, ruthlessly disregard any human interest or preference which stands in the way of pursuing the best for non-human animals. Yet again, we must recall the advice of the Mills and Popper that institutions ought to prepare for extremes, thus also for animal trustees who lack regard for humans.

In order to be able to determine an acceptable amount of political power for animal trustees that can secure both objectives, we must first know how we can determine “an amount” of political power in general. This is, however, not easy at all. Political power is an elusive phenomenon which cannot be exactly expressed in numbers. The amount of political power that an institution has is always determined by a number of factors, among which the interacting powers of other institutions. There seem to be two factors, however, which clearly have great influence on the amount of political power that an institution has in general: its competences (expressed in legal mandates), and its size (such as the amount of seats for representatives). The amount of political power of an institution is, in that sense, comparable to the power of a horse-drawn carriage. The total amount of power is primarily determined by what the individual horses can do (the *competences* of the horses) and by the total number of horses pulling the car (in other words, the *size* of the group of horses).

With regard to the first factor, concerning competences, it seems clear that an institution has more political power the more competences it has and the broader these competences are. When considering animal trustees, assigning them the competence to veto acts of parliament would certainly

make them more powerful than assigning them the competence to merely advise the parliament. The second factor, the size of the group of animal trustees, is similarly determinate for how powerful it is. Suppose that some number of animal trustees were to gain seats in parliament and that these trustees would have the exact same competences as other members of parliament. In that case, the number of animal trustees (the size of the institution that represents animals, in other words) would clearly determine how powerful they would be. The more parliamentary seats for animal trustees, the more political power animal trustees would have. In looking for a defensible distribution of political power between human representatives and animal trustees, we must thus keep in mind that these two factors, *competences* and *size*, are the ones we can modify in order to bring about a larger change in the total amount of political power of animal trustees.

*The competences of institutions that represent animals*

Let us first consider looking for an appropriate amount of political power for animal trustees by exploring different competences. Suppose that we were considering introducing an extra-parliamentarian body as a way of constitutionally realizing the right of non-human animals to be politically considered. For convenience' sake, let us call this body an "animal committee," but this can, in principle, be any political body constituted of animal trustees. Further suppose that the human parliament stays the way it is: representing humans only. This animal committee would be added to and embedded in the institutional structures in order to take institutional notice of animal interests. The question that immediately presents itself, and that is directly related to the theoretical issue discussed here, is: what competences ought such an animal committee have?

The first objective, that the political consideration of animals' interests must not be contingent, seems to require that the animal committee has substantial powers. From this perspective, the animal committee will need the power to overrule (amend or even invalidate) any act of parliament, and possibly executive decisions too, if the committee considers the act or decision to unwarrantedly violate non-human animals' interests. The committee would, in other words, need veto power (a competence) over

initial political decisions in order to be able to ensure that non-human animals' interests are non-contingently considered.<sup>281</sup> Under the condition that the animal trustees would indeed politically act in accordance with the interests of non-human animals, the animal committee would simply strike down any act of parliament or executive decision that unwarrantedly violated the interests of non-human animals. An animal commission with veto power thus seems appealing as an option for politically institutionalizing the consideration right of animals from the perspective of the non-contingency requirement.

Assigning an animal committee veto power may, however, lead to a situation in which human interests and preferences are disproportionately discredited, since political issues will only be approached from the perspective of non-human animals in the final instance. The second objective, which is to protect human democratic rights as well, thus is jeopardized if an animal committee is assigned veto power (especially if animal trustees are not popularly elected, as was considered preferable from the perspective of preventing abuse of power). There would be no guarantee that an animal committee with veto powers would give due regard to human interests and preferences. Since, by definition, a veto committee has the last word, there would also be no option for the human parliament to make corrections in this regard. In principle, the competences of the animal committee would allow the committee to interfere every time an act of parliament is issued that has even the remotest relation to animal interests. Furthermore, the animal committee would be allowed to strike down acts of parliament that even minimally infringe on the interests of non-human

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<sup>281</sup> The idea of a political body with veto powers is not uncommon in the literature on the representation of future people. Dennis F. Thompson references the plebeian Tribune in the Roman Republic. This Tribune's mission was to protect the rights and interests of the plebs, who were otherwise underrepresented in politics. The Tribune had the power to veto legislative acts. Even though Thompson takes inspiration from the Roman Tribune for the trustee committee for future people that he proposes, he does not copy the Tribune's power to veto legislative acts in his own model without attenuating it. He argues that any overruling decision of the trustee committee should be reviewed by an independent judiciary. Also, Tine Stein has proposed to install an ecological council with veto competences. In her proposal, however, the veto competence does not concern amending or invalidating proposed legislation or executive decisions, but it merely assigns the council the right to suspend legislation. In effect, the environmental council would only be able to delay the legislative process. Thompson, "Representing Future Generations," 30–32; Stein, "Does the Constitutional and Democratic System Work," 436–442.

animals, even if, objectively speaking, this infringement were justified. In short, it seems like the second objective of respecting the democratic rights of humans is incompatible with assigning a hypothetical animal committee veto competences. The two objectives at play seem to be pulling in opposite directions when it comes to determining the amount of power that must be assigned to animal trustees through adjusting competences.

It may still be possible to find a middle ground, however. It is possible to limit the political mandate of the animal committee somewhat by making its veto power conditional on meeting some substantial criteria.<sup>282</sup> We can imagine, for example, that the law would formulate specific conditions under which acts of parliament may be amended or invalidated by the animal committee. The competence of the committee to overrule acts of parliament could be conditional, for example, on fundamental non-human animal interests being truly in danger. The law could determine that the animal committee would be merely authorized to overrule an act of parliament if, for example, this act were to “demonstrably affect the fundamental interests of non-human animals.” A different option is that the law could dictate that the animal committee may only overrule an act of parliament if the “anticipated effects” of that act on animal welfare were “severe.”

Obviously, there are many more options of making the competences of the animal committee conditional, but these need not be exhaustively assessed. This is not necessary because it seems that the general effectivity of the method of limiting the powers of the animal committee by making its competences conditional can be questioned. Even though this method may seem, in theory, an attractive option, it is hard to see how it could be effective in practice. The crucial question is who ought to determine whether an act of parliament “demonstrably affects” non-human animal interests, or whether the “anticipated effects” of an act of parliament on animal welfare are “severe.” Yet again, we are confronted with the problem that no legitimized person or group of persons can be trusted to genuinely, objectively, and incorruptibly review these matters. Both the human

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<sup>282</sup> González-Ricoy and Gosseries, “Designing Institutions for Future Generations,” 11–14.

parliament and the animal committee would be stakeholders in deciding these matters, and they both are not objective enough to review whether the conditions that trigger the veto power of the animal committee are met. The human parliament obviously has a strong incentive to block the overruling powers of the animal committee, and the animal committee has an obvious incentive to rule in favour of its own veto rights. Judicial review might be thought to be a solution here. Courts, after all, may be trusted to be objective in this regard. However, the matters at hand are yet again highly politically sensitive, and the legal basis necessarily imprecise, which means that, in this context, too, judicial review would be undesirable from the perspective of the separation of powers and from the perspective of maintaining the impartial and objective reputation of the judiciary in general.

It seems that finding a balance between the powers of human representatives and animal trustees by adjusting the competences of the animal trustees is difficult, if not impossible. The signalled risk that human interests and preferences will be institutionally disregarded if the animal committee gains substantial competences are not typical to the discussed animal committee but inherent to assigning significant competences to any group of animal trustees as such. This risk is thus likely to reappear in every other institutional design in which animal representatives are assigned a substantial amount of political power by way of giving them broad competences. As a consequence, we might consider equalizing their competences with those of human representatives, and continue our search for the right amount of political power that ought to be transferred to the group of animal trustees by way of altering the other factor instead: their size. Possibly, we can come closer to finding an equilibrium of political powers if we take a closer look at the dimension of the group of animal trustees.

#### *The size of institutions that represent animals*

When contemplating on what the right size of a group of animal trustees could be, one well-established method of distributing political power immediately presents itself: equal distribution of political power, which would effectively mean that one human citizen would weigh as much as one

sentient non-human animal citizen. Would it be desirable to install a number of animal trustees proportional to the number of sentient non-human animals in a certain state? Could we, in other words, extend the principle of equal representation beyond humans and include non-human animals in this principle as well? There seem to be some problems with uncritically applying the principle of equal representation in the context of interspecies democracy. Some of these problems are quite similar to the objections that have been voiced against an equal representation of future people.<sup>283</sup>

The first objection against a proportional distribution of political power among animal trustees and human representatives based on the volume of their principals and constituents, is that it seems impossible to practically realize. In the context of future people representation, it has been pointed out by Gregory S. Kavka and Virginia Warren that it is impossible to know how many future people will exist.<sup>284</sup> Something similar is true with regard to non-human animals: it is virtually impossible to determine how many sentient non-human animals reside on the territory of a particular state. This seems to obstruct the practical realization of equal interspecies representation, for which the number of non-human animal citizens must be known. Accepting a dynamic citizenship of non-human animals, which has been proposed earlier in this book, would further complicate the matter. In this context, dynamic animal citizenship would mean that sentient animals would have to be politically represented the moment they enter the territory of the state. Hence, the number of sentient animals will not only be impossible to determine, but also always in flux due to animals continuously crossing the borders. Consequently, the fixed number of animal trustees in representational institutions can never be precisely proportional to the unknown and fluctuating number of sentient animals with a consideration right.

It seems possible, however, to accept this as a fact and work around these practical difficulties by making an estimation of the number of sentient

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<sup>283</sup> Stone, *Should Trees Have Standing*, 21; Kavka and Warren, "Political Representation for Future Generations," 34–35; Thompson, "Representing Future Generations," 29.

<sup>284</sup> Kavka and Warren, "Political Representation for Future Generations," 34.

animals on the territory of a state instead.<sup>285</sup> Making the number of animal trustees proportional to the estimated number of non-human animals with a consideration right seems an imperfect but practically viable option. However, other objections would still plead against accepting equal representation in an interspecies context. Kavka and Warren have illustrated that making the representation of future people proportional to their estimated number would lead to a situation in which the representatives of future people would vastly outnumber current representatives.<sup>286</sup> Something similar would, again, be true in the context of non-human animal representation. If we were to make the number of animal trustees proportional to the estimated number of sentient non-human animals residing in a state, only a small number of representative positions would be left for human representatives. This would make their political power virtually negligible, which seems instinctively objectionable. For Kavka and Warren, the prospect of such an imbalance in political power is enough reason to reject an equal representation of future people.<sup>287</sup> It seems, however, that a convincing additional argument must be given before we can definitely reject a proportional distribution of power among non-human animal trustees and human representatives. If equal representation is *in principle* justified, we seem to have to accept the consequences of applying it in practice too, even if these consequences were to initially feel objectionable.

There is, however, a good principled case to make against equal distribution of power in the interspecies democracy. Equal representation as a matter of principle does not seem easily justifiable in an interspecies context, because this would deny the objective surplus value that political agency has over political patency. The underlying presumption of equal representation is that all individuals with a right to political representation have something close to an equally valuable input to politics. That is to say, it is assumed that one person's interests and preferences are not more valuable than another's. A democracy typically accepts that all votes,

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<sup>285</sup> In the context of future people representation: Kavka and Warren, "Political Representation for Future Generations," 34.

<sup>286</sup> Kavka and Warren, "Political Representation for Future Generations," 34.

<sup>287</sup> Kavka and Warren, "Political Representation for Future Generations," 34.

through which interests and preferences are politically defended, count equally. It would be inadequate, however, to presume that non-human animals have just as much to offer, *politically*, as human political agents—which is not the same as saying that their *interests* are of less value, which is not the case. We must recognize that when it comes to the political input of humans and non-human animals, there is a relevant difference which would make it unreasonable to stick with the assumption that both are equally valuable. The input of human agents in politics is richer and objectively more valuable, for they bring in not only their interests, but also considered political preferences and opinions, long-term visions about the general path of politics, and generally the capabilities to keep a state and a government up and running. These considered political opinions and capacities that only political agents possess are indispensable for operating and maintaining a political system. Non-human animals, like children, have no such political ideas and competences. Their “input” consists of interests only, and they only need representation for defending their interests on an equal level with those of humans. Were we to assign political positions to animal trustees in proportion to the number of non-human animals, this would be a denial of the objective surplus value of the political capabilities and reflected political preferences of human agents. Therefore, it seems that uncritically adopting the principle of equal representation in an interspecies democracy is unwise.

A different problem concerns the legitimacy gap that would arise if the principle of equal representation were accepted in an interspecies context. If human and non-human animals were proportionally represented, animal trustees would not only have a proportional say on matters that relate to the welfare of individuals, which would be justified, but also on matters which do not directly concern the welfare of individuals. Animal trustees would have proportional influence on more complicated and abstract matters which require advanced and sophisticated consideration, such as matters relating to the constitutional structures of the state. Animal trustees would, in other words, have the political power to co-decide these matters which do not directly relate to animal interests. Importantly, however, animal trustees would not be democratically legitimized for co-deciding these matters, because their principals, non-human animals,

typically have no political ideas or ideological preferences about the constitutional structures of the state which their trustees can represent. This would thus create a situation in which animal trustees would have substantial power to decide matters relating to the general path and future of liberal democratic institutions, while lacking guidance from their principals, and thus legitimacy on these matters. Creating such a legitimacy gap by introducing equal interspecies representation is highly undesirable from a democratic point of view (about which more in the next subsection), which is another principled reason for rejecting equal interspecies representation. In an attempt to circumvent this legitimacy gap, one may argue that we could opt for making the competences of animal trustees conditional to the circumstance of relating to welfare issues. However, we have just established that conditional competences such as these, although attractive in theory, are hardly practicable because they confront us with the problem that no legitimized person or group of persons can be trusted to genuinely, objectively, and incorruptibly review whether the condition that triggers the powers of the animal trustees is fulfilled.

If we agree that human agents may be assigned more than proportional political powers on account of their surplus capacities, which define their political agency, it seems that we must let go of the 1:1 ratio in political power distribution and find a new ratio. It is quite a challenge to find a new ratio that could be normatively defensible, however. One option of distributing power could be to choose a percentage and assign animal trustees that percentage of seats in parliament. In the context of the enfranchisement of future people, Kristian Skagen Ekeli has proposed that we assign the representatives of future people five percent of political power, expressed in parliamentary seats.<sup>288</sup> Could something similar be an option in the context of non-human animal enfranchisement?

There are some problems with picking a random percentage such as five percent for determining how many parliamentary seats will be assigned

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<sup>288</sup> Ekeli, "Giving a Voice to Posterity," 434.

to animal trustees.<sup>289</sup> The first and most obvious problem is its arbitrariness. In the context of the representation of future people, Ekeli all too easily skips the fundamental question of how a number such as five percent can be justified. To Ekeli, the exact amount of political power to be transferred to the representatives of future people (in other words, the percentage) is not what is important; the fact that future people are represented at all is what matters. From the perspective of deliberative democracy, Ekeli values that the representatives of future people are able to make available “relevant proposals, information, and arguments” concerning the interests of future people in parliament, and he considers the number of representatives who ought to do this of secondary importance.<sup>290</sup> However, secondary importance or not, the choice of a certain percentage is a fundamental choice that must be accounted for in a normative sense. This percentage directly influences the total amount of political power for animal trustees, and this thus ought not to be an arbitrary number. Picking a random number for determining the ratio of power distribution without underpinning it with arguments seriously underestimates the fundamentality of this choice. Why would five percent of political influence be the right amount and not the tenfold of that: fifty percent? As long as such a fundamental question remains unanswered, adopting a five percent policy, or any other arbitrary number, seems normatively hard to defend.

The second problem with picking a random percentage is that it cannot be regarded as a serious solution to the challenge of finding the right balance in the political powers of human representatives and animal trustees. It seems that no one percentage can secure the two previously discussed objectives. If animal trustees were to have little power, expressed in a small percentage of seats (such as five percent), then it could not be assured that non-human animals’ interests would be given due consideration. To Ekeli, this is not a problem, since for him it is sufficient if

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<sup>289</sup> An argument against arbitrary quota that was put forward by Dennis F. Thompson that will not be discussed here is that arbitrary quota would undermine the principle of equal representation. This argument is not further discussed because it was just argued that this principle might not be appropriate in the interspecies context anyway. Thompson, “Representing Future Generations,” 29.

<sup>290</sup> Ekeli, “Giving a Voice to Posterity,” 442, 445–446.

the interests of future people are merely *voiced* in parliament (which can be achieved by even one representative), not necessarily duly considered.<sup>291</sup> In our context, however, non-contingency of non-human animal consideration is one of the key requirements for animal enfranchisement, and the legitimacy criterion requires an institutional setting that could reasonably be interpreted as reflecting the political equality of every member of the demos. Consequently, very little power for animal trustees, such as five percent of parliamentary seats, would be normatively deficient. On the other hand, if animal trustees had a larger percentage of seats, say sixty or eighty percent, then the other objective of respecting humans' interests and preferences would be in danger, which is also undesirable. Not even a middle ground, such as a fifty-fifty ratio of seats distribution would solve matters here, because it would still be an arbitrary division, and the previously noted objection that animal trustees would not be legitimized to decide matters beyond the welfare of individuals would still stand.

The foregoing illustrates that it is very difficult to come up with a distribution of political power between human representatives on the one hand and animal trustees on the other that is normatively defensible and practically realizable. It seems clear that we cannot compromise on any of the pursued objectives which, in short, prescribe respecting both humans' and non-human animals' democratic rights. Furthermore, we have seen that we must be careful not to create a legitimacy gap by assigning animal trustees political powers over issues on which the interests of non-human animals offers them no guidance.

Modifying the competences of animal trustees or the size of the institution comprised of animal trustees cannot solve the issue here, because the objectives pursued seem mutually exclusive. The more we restrict the political power of animal trustees (in competences or size), the more the animal institution becomes a toothless tiger and the more we move into the direction of compromising on non-contingency and interspecies legitimacy requirements. Inversely, the more extensive the political powers of animal

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<sup>291</sup> Ekeli, "Giving a Voice to Posterity," 442, 445–448.

trustees (in competences or size), the greater the compromise on humans' preferences and interests, and the greater the legitimacy gap. Pushing around political power between human representatives and animal trustees is not likely to lead to a solution here. Any conceivable distribution of political power will not only necessarily be arbitrary, but it will also compromise on one of the pursued objectives and thus be normatively deficient.

### *V. Democratic costs*

It has been suggested in previous subsections that, from the perspective of preventing abuse of power, the political enfranchisement of non-human animals would require the shifting of some political power from human representatives to animal trustees who are not popularly elected. Apart from the problems with this manoeuvre that have already been discussed (removing popular election is still insufficient in combatting abuse of power, and it cannot be determined how much political power ought to be transferred to animal trustees), there may be some additional, yet undiscussed reservations about transferring political power to unelected animal trustees. These various reservations concern the acceptability of this manoeuvre from a democratic point of view, and may thus be summarized as concerns about the *democratic costs* of enfranchising non-human animals. Controlling these democratic costs is the next challenge of politically enfranchising non-human animals.

Concerns about how democratic the investigated political enfranchisement of non-human animals is must be taken seriously. Three possible democratic problems with enfranchising non-human animals can be identified. The first democratic objection against the enfranchisement of non-human animals is that transferring political power from human representatives to animal representatives *as such* is problematic. The second objection considers assigning animal trustees political power to (co-)decide matters which are *not related to animal interests* problematic. The third objection considers assigning political power to animal trustees who are *not popularly elected* to be a democratic problem. These objections and whether they are convincing will now be discussed.

*Assigning animal trustees political powers as such*

The main reason for considering the political enfranchisement of sentient non-human animals was democratic in nature. From this perspective, the first concern, that assigning political power to animal trustees is *per se* democratically illegitimate, seems alienating. The objection here is that such a transfer of political power is, in and of itself, undemocratic—irrespective of whether animal trustees are elected by the human public or not and irrespective of the competences they will have. Animal trustees simply ought not to gain political power from this point of view.

This objection seems quite crude and misplaced if we recall the reason for assigning non-human animals passive democratic rights in the first place. We have seen that a consistent application of classic democratic principles leads to the conclusion that some non-human animals are also part of the demos and that this has consequences for our understanding of democratic legitimacy. Democratic legitimacy in its least demanding form (procedural legitimacy) requires having basic democratic institutions and procedures in place that are consistent with the political equality of every member of the demos. The current institutional structures of liberal democracies raise serious legitimacy concerns, because we have seen that they are unwarrantedly anthropocentric. From this perspective, giving animal representatives a role in the democratic process as such seems not to decrease democratic legitimacy but rather increase it. Animal trustees could offer the non-human part of the demos the political representation that they have a principled right to, but that is currently lacking.

The objection that introducing animal trustees is illegitimate *per se* can only be persuasive if we stick with the anthropocentric democratic paradigm and conflate democratic legitimacy with human voting. In other words: it is only in the paradigm of the old anthropocentric idea of democratic legitimacy that the insertion of animal representation as such can be perceived as decreasing democratic legitimacy. In this old paradigm, reflecting the political equality of the demos is mistakenly equated with respecting only the wills of human agents. “Universal suffrage,” which in practice means distributing political power merely among human agents, is then taken to be a sufficient means of institutionalizing political equality and

thus considered democratically legitimate. However, merely respecting the explicated wills of people by means of elections is inherently discriminatory, for it ignores the fact that there are also individuals in the demos who are of political concern but who cannot engage in the complex activity of voting. Since political non-agents can also have relevant interests deserving of democratic respect, the “popular vote” can no longer be a synonym for democratic legitimacy, because only human agents are able to vote. Applying this old idea of democratic legitimacy in this context by claiming that injecting animal trustees is by definition undemocratic would be highly inconsistent. In interspecies liberal democracy, such an old and anthropocentric idea of what democratic legitimacy entails must make way for one that is more consistent with modern understandings of animals. In fact, the interspecies notion of democratic legitimacy seems to prescribe rather than resist transferring some political power from human representatives to animal representatives.

*Assigning animal trustees political powers unrelated to animal interests*

Shifting political power from politicians who represent humans to politicians who represent other animals thus need not constitute a democratic problem as such. In fact, the opposite seems true. However, the second democratic concern with regard to enfranchising animals is not directed at enfranchising them as such but problematizes the hypothetical option of assigning animal trustees political powers that go beyond deciding matters which are related to animal interests. This concern was already briefly voiced in the previous subsection about the proper distribution of political power, and it seems an appropriate concern.

That there is not by definition a democratic problem with adopting animal trustees in the institutional structures of liberal democratic states does not mean that everything is permitted. What follows from a modern interspecies interpretation of democratic legitimacy is that there must be some non-contingent institutional reckoning of non-human animals’ interests, possibly through installing animal trustees. These trustees, however, would only have legitimacy insofar as they utilize their power to defend non-human animals’ interests. They would be appointed and

legitimized to execute precisely that task and for nothing more than that. Since their principals, non-human animals, cannot offer them guidance on anything beyond matters relating to their interests, animal trustees would not be legitimized to use their political powers for matters which go beyond animal interests. They would, for example, not be legitimized to decide matters such as whether a country should adopt binding referenda, whether the retirement age should be raised, or whether taxes should be heightened, because these matters do not directly affect the interests of non-human animals, and the trustees' opinions on these matters are thus not legitimized, nor more valuable than those of other human agents. If animal trustees had the possibility to co-decide these matters, a legitimacy gap would appear. They would have substantial influence on complicated and abstract matters which require advanced consideration but for which they are not democratically legitimized. They are merely legitimized for doing what the "equality of every member of the demos" requires, and since non-human animals are merely equal to human agents in that they have interests to be defended, the legitimate mandate for animal trustees merely concerns defending these interests, not personal political preferences unrelated to animal interests.

*Assigning unelected animal trustees political powers*

The third democratic concern with regard to politically enfranchising animals problematizes the proposed choice of decoupling the selection of animal trustees from popular election. This implies a loss of popular control over the government, which may constitute a democratic problem.

Let us first recall what the reasons were for decoupling the selection of animal trustees from popular election. First of all, it was argued that the mere existence of animal representatives should not be fully dependent on whether the human electorate feels enough urgency to elect them, because this would be a violation of the non-contingency requirement. One could argue, however, that we could ensure a safe, non-contingent institutional position for animal trustees but still select them by way of general elections. There was, however, a more important reason why this option ought to be rejected. The main reason to reject election of animal trustees by the general

public was that authorization by the human electorate would incite animal trustees to make anthropocentric political choices. Their election would likely frustrate the alignment of animal trustees' political behaviour with the actual interests of non-human animals and thus encourage abuse of power. It was primarily for this reason that decoupling elections from the selection of animal trustees was considered essential.

Disconnecting the selection of animal trustees from general elections seems to cause a new problem, however: it also weakens societal control over governance. Political power would be transferred from elected human representatives to non-elected animal representatives: representatives over which society has no control. This would mean that some amount of political power would be placed outside of popular control. Both the selection and the functioning of animal trustees would then no longer be subject to public scrutiny. This transfer of political power thus diminishes popular control over the state and its institutions, governance, and policy.

Weakening society's grip on the state is almost always a bad idea. Popular control, in the sense that society has a controlling influence over the specific doings and the general direction of the state and its institutions, is one of the most important aspects of a liberal democracy. One of the benefits of popular control is that it helps to align governance with the wishes of the electorate, but this benefit can be relativized in the interspecies context, because we have seen that it merely aligns governance with the wishes of human political agents, not the complete interspecies demos. However, alignment is not the most important function of popular control. More importantly, by means of popular control, society is able to keep in check the well-known tendency of governments to extend their own powers, suffocate society, invade people's private lives, trample on people's rights, and ultimately clamp down on society as a whole and become totalitarian. It is, in that sense, apt to say that either the people control the government, or the government will control the people. Precisely to prevent the latter, in other words to protect individual rights and maintain a limited government instead, popular control is a jewel to be guarded with the utmost seriousness. The liberalness and limitedness of a government can only be preserved if society guards its own limits, which must be institutionally

facilitated through enabling popular control of governance. Furthermore, popular control enables society to not only criticize government, but also to immediately redirect it in case it derails (self-correction) and to remedy any detected problem, which is essential to democracies.<sup>292</sup> Through self-correction, popular control thus also enables society to improve governance in the long term.<sup>293</sup>

In short, popular control is an essential precondition for the long-term stability and success of liberal democracies. A democracy with failing popular control is in danger of degradation. Electoral appointment of government officials is the primary instrument to bring about popular control, and thus shifting political power from elected officials to unelected animal trustees would put a section of political power beyond popular control. It would institutionally block off popular control in proportion to the amount of power that will be transferred to unelected animal trustees. In the light of the foregoing, such a loss of popular control seems worrying, and ought to be prevented.

In sum, not all democratic objections against transferring political power to animal trustees are convincing. Transferring political power to animal trustees could not be rejected on the mere ground that this transfer, as such, would be democratically illegitimate. There is reason, however, to be wary of transferring political power to animal trustees if they are not popularly elected and/or if these powers include the power to decide matters not related to the interests of non-human animals. In these cases, introducing animal trustees might do more harm to liberal democracies than can be made up for by improving interspecies democratic legitimacy.

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<sup>292</sup> Popper, *The Open Society and Its Enemies* (Vol. I). See on self-correction as an essential element of democracies also: Bastiaan Rijpkema, *Militant Democracy: The Limits of Democratic Tolerance*, trans. Anna Asbury (New York: Routledge, 2018).

<sup>293</sup> Popper, *The Open Society and Its Enemies* (Vol. I), 124–125.

## VI. *Conflicting interests*

A different problem that needs to be addressed and that poses a challenge to politically enfranchising non-human animals is that the interests of non-human animals that trustees ought to bring into the democratic process are not homogeneous.<sup>294</sup> Up to this point, I have been talking about “non-human animal interests” as though they constitute a distinguishable group of identical interests and as if no conflict exists *between* the interests of different non-human animals. This is, however, obviously an oversimplification of reality.

In reality, there are not only many conflicts of interests between non-human animals on the one hand and humans on the other, but also between non-human animals of a certain species on the one hand and animals of another species on the other, or even between animals of one and the same species. What is in the general interest of foxes (prohibiting fox hunting by humans, for instance), runs directly counter the general interest of rabbits, on whom foxes prey. What is in the general interest of the lion (prohibiting trophy hunting, for instance), is not in the general interest of the gazelle, and so forth. When speaking of animal trustees’ task to represent animals’ interests in political institutions, it is thus not adequate to speak of *the* interests of non-human animals, as if it were a homogeneous thing that can be easily deducted from merely studying animals. Speaking in such general terms fails to take account of the reality in which the interests of some animals are necessarily in conflict with the interests of other animals. Demanding animal trustees to represent *the* interests of non-human animals thus is a more complicated assignment than it seems, for representing a widely varying group of animals necessarily involves representing many mutually excluding interests.

The diversity of animals’ interests and their unavoidable internal conflicts are, however, clearly not unique to non-human animals. The natural situation among non-human animals is comparable to that among humans, who also have mutually exclusive and competing interests. The

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<sup>294</sup> In the context of the enfranchisement of future people, the heterogeneousness of future people’s interests was addressed by Kristian Skagen Ekeli, in: Ekeli, “The Principle of Liberty and Legal Representation of Posterity,” 393–394. See on animals also: Cochrane, *Sentientist Politics*, 56–60.

resources necessary for fulfilling our interests are limited, and thus, according to the old wisdom of Thomas Hobbes (1588–1679), humans become “enemies” of one another if they desire things that they cannot both enjoy. Ultimately, they need some type of government to manage and remedy these (looming) conflicts.<sup>295</sup> Still, no government can prevent human interests from conflicting with one another. Even in current well-functioning liberal democracies, many conflicts of interests between humans exist. What is in the interest of a poor person (free education, affordable collective health care, substantial taxes on savings), is often not in the interest of a rich person. What is in the interest of a person who travels only by public transport (state subsidies on public transport, high taxes on CO2 emissions) is not in the interest of a person who generally travels by car, and so on. In these ways, and many more, human interests also clash with one another, which is inevitable in a world in which scarcity is a reality. This situation of endlessly clashing human interests does not seem to be radically different from that of non-human animals. At best, governments can hope to manage these unavoidable conflicts of interests by forming an institutional framework in which such conflicts can be remedied in a relatively peaceful way. For human agents, the most obvious way of institutionally channelling these unavoidable conflicts of interests is to offer individuals the possibility to defend their unique set of interests by equipping them with voting rights. For non-human animals, however, this is not an option, and so another solution will have to be found.

### *Categorical representation*

One option of institutionally channelling the multiple and diverging interests of non-human animals is to introduce separate trustees for different categories of animals who have similar interests. We may label this option *categorical representation*. It is possible to establish distinct animal trustees for different species of animals, for example distinct trustees for respectively foxes, rabbits, lions, and antelopes. Alternatively, it is possible to establish

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<sup>295</sup> Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996/1651), 86–111.

distinct trustees for prey animals on the one hand and predatory animals on the other hand. Dividing non-human animals into different groups with overlapping interests allows us to assign each of these groups their own trustee.

An important problem with such a construction, however, would be that any demarcation of a group, for example along species or predator/prey lines, would necessarily be inconclusive. Matching distinct trustees to different categories of animals fails to take into account the reality that the interests of animals do not necessarily follow species membership or predator/prey lines either. In reality, interests also clash between animals of the same species, for example when the political issue is whether some rabbits are to be sacrificed for experimentation objectives in order to gain medical knowledge that would benefit all pet rabbits. Additionally, predatory animals and prey animals may occasionally share the same interests, for instance when the political issue is whether the protected status of a certain nature park will be withdrawn in order to build apartments in the area where both predatory and prey animals live. Categorical representation thus does not seem ideal, because demarcation lines aimed at grouping animals with similar interests together are necessarily inadequate.

### *Internal weighing*

Categorical representation may not be the only option for institutionally channelling the multiple and diverging interests of non-human animals, however. A different option is what we may label *internal weighing*.<sup>296</sup> It is possible to make animal trustees professionally responsible for managing the multitude of interests amongst non-human animals by making it their responsibility to first map all the relevant interests and then weigh these interests by themselves. In practical terms, internal weighing would proceed

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<sup>296</sup> Internal weighing must be distinguished from the earlier-discussed concept of encapsulated interests, which refers to the situation where people with representation rights allegedly also automatically represent others who lack representation rights of their own, because the latter's interests are presumed to be included in the "master's" interests. Whereas the concept of encapsulated interests has no specific concern for equally and independently weighing the interests of the represented (women/children/non-human animals) against other interests, having independent and equal concern for the interests of all those represented is a crucial requirement in the here discussed ideal concept of internal weighing.

as follows. First, the animal trustee would need to form an idea of the interests of animals that are relevant to a certain political issue. He must, for example, form an idea of the independent interests of the foxes and the rabbits (and all other sentient animals) who can be harmed and benefitted by a possible ban on fox hunting. Subsequently, he would need to determine which of these interests is, over all, the weightiest and let this be decisive in determining what course of political action he will pursue.

In the first step, the trustee would be required to picture the relevant interests of all animals who would be affected by a certain political course of action. These interests ought to be, as it were, present in the trustee's mind. This phenomenon, in which representatives invoke, include, and involve the interests of entities not already explicitly present in the democratic institutions, has been labelled *deliberation within* by Robert E. Goodin.<sup>297</sup> Deliberation within requires that representatives "deliberate" in their own minds and try to envision the views of others without these others being able to present and defend their own views and interests. Deliberation within might be a partial substitute for the explicit categorical representation of different groups of animals with specific interests, because the perspectives of the foxes, rabbits, lions, and gazelles are already "present" in the representative's mind. In theory, the representative can "project himself into" the position of any animal at any time, enabling him to bring into the deliberation the perspective of all relevant animals.

The more challenging part of handling animals' diversity of incompatible interests, however, is the second step: the weighing of these "imaginatively present"<sup>298</sup> interests. Not only must the trustee be able to envision all relevant independent interests relating to a specific political issue (step one), he must also objectively weigh these divergent and numerous interests (step two) and determine which interest is the weightiest. This step appeals even more to the qualities of the animal trustee. The animal trustee yet again will have to utilize his own intellectual powers and judgement capacities to decide which animal interests are objectively

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<sup>297</sup> Goodin, *Reflective Democracy*; Robert E. Goodin, "Democratic Deliberation Within," *Philosophy & Public Affairs* 29, no. 1 (Winter 2000): 81–109.

<sup>298</sup> Goodin, "Democratic Deliberation Within," 83, 84, 98, 99.

the weightiest, having considered all non-human animals' interests relevant to the respective political issue. The *number* of individual animals affected by a certain political course of action and the *gravity of the impact* on the welfare of those individuals are two factors which may guide the trustee in determining whose interests are the weightiest and ought to be politically prioritized.<sup>299</sup> The trustee obviously ought not to let personal preferences or species bias cloud his judgment.

There seem to be some problems with internal weighing too, however. Objectivity is of the utmost importance if we were to opt for internal weighing. In that case, the only chance for non-human animals of having their interests genuinely considered in the democratic process is when the animal trustee does so in his head. It thus will have to be ascertained that the trustee weighs out all the relevant non-human animal interests on their objective merits, and he must eventually make an unbiased judgment as to which animals' interests are the ones to prevail. Without this objectivity, the non-contingency requirement is violated, because by the mere absence of animal X in the trustees' mind, this animal will no longer have any chance of having his interests politically considered. It seems, however, that the objectivity of animal trustees can hardly be guaranteed, which means that a non-contingent consideration of animal interests also cannot be guaranteed. Since the weighing of animal interests would be particularly opaque (for they would proceed in the trustee's mind), and since we have seen that animal trustees are virtually unaccountable, it seems also impossible to institutionally force trustees into the required objectiveness.

In short, the reality that the interests of non-human animals are heterogeneous and in constant conflict with one another is yet another challenge that makes the political enfranchisement of non-human animals particularly complicated. Both categorical representation and internal weighing fail in institutionally channelling the diversity of interests among non-human animals in a normatively acceptable way.

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<sup>299</sup> In the context of future people representation: Ekeli, "The Principle of Liberty and Legal Representation of Posterity," 393–395.

### **3.2 Recapitulation of politically institutionalizing regard for animal interests**

The foregoing elaboration has illustrated that giving effect to non-human animals' consideration right in the political institutions comes with many challenges, some of which appear to be very hard to solve. The central complicating theme, which was directly or indirectly central to almost any discussed challenge, is the reality that non-human animals are political patients, unable to be aware of, understand, and engage in political acts. The political patency of non-human animals turned out to be a cause of other problems, and the solutions that were suggested to solve these problems caused many new problems in return. It ultimately led us into a web of intertwined normative and practical requirements of political animal enfranchisement, and many of these have appeared to require opposite things. The purpose of this recapitulating and analysing section is to clarify how the independently discussed challenges in this chapter relate to one another and to the enfranchisement criteria. This recapitulation will help us to form an idea of the overall possibility of enfranchising animals in political institutions and to gain a better understanding of the underlying problems of this endeavour.

At the very beginning of this chapter, it was noted that non-human animals' political patency disqualifies them from general, formal political representation, because they are unable to elect and redirect their own political representatives. Furthermore, they cannot inform their political representatives about the preferred representation of their interests. These circumstances forced us to opt for a less common form of political representation: political guardianship. A political guardian or trustee would have to professionally represent and defend the actual interests of non-human animals. He would have to inform himself about the latest scientific knowledge of animals' interests in order to be able to know how animals will be affected by certain policies, and he would have to distinguish between animals' important preferences and their irrational preferences that he generally ought to disregard. Furthermore, since the interests of different animals conflict with one another, the political animal trustee might also

have to become responsible for mapping out the relevant interests of all sentient non-human animals and then determine the relative weight of these interests. It has been argued, however, that this would require an unreasonable objectivity on the side of the trustee and that thus a non-contingent consideration of animal interests cannot be guaranteed. The other option of institutionally dealing with the heterogeneity of animal interests, categorical representation, also seemed far from ideal, which left the challenge of dealing with the heterogeneity of animal interests ultimately unsolved.

The inevitable choice of trustee representation complicated other challenges. One of those challenges is controlling the risk of abuse of power. This is a challenge to any form of representation, but we have seen that, especially in the case of trustee representation, preventing abuse of power is extremely difficult but all the more important. An animal trustee has relatively many opportunities to abuse his power, for it is his job to give substance to the content of representation, he is allowed to overrule the expressed preferences of his principals, and animals have no option of controlling him. The bad track record of guardianship governance in history should make us extra alert to abuse of power. It was thus considered highly important to find a way to ascertain that the political animal trustee, who would paternalistically look after the interests of non-human animals in political institutions, would only act in the interests of the animals and thus not abuse his power.

In finding ways to control this risk of abuse of power, the reality that non-human animals cannot elect their own representatives came back to haunt us again. Popular control by way of general elections is a proven mechanism against abuse of power in the human case. By authorizing and holding their representatives accountable via elections, human agents are enabled to screen out the politicians that they distrust or that have proven to abuse their power. Since non-human animals are unable to elect their own representatives, the world's most efficient instrument of preventing and remedying abuse of power is not available to non-human animals—a difficulty yet again rooted in their political patency.

Because non-human animals cannot elect and control their representatives, there is a shortage when it comes to the accountability of animal representatives. This is problematic, because accountability is one of the key mechanisms that can prevent and remedy abuse of power. Without recovering some type of accountability, there seems to be no guarantee that animal trustees will align their political choices with the actual interests of non-human animals and animal trustees cannot be redirected or institutionally sanctioned if they abuse their power at the expense of the animals they ought to represent. But if not to their principals, to whom or what should political animal trustees be accountable? Thompson and Smith have suggested that trustees could be made accountable to their own personal principles or to an ideal fulfilment of their role. We have seen, however, that these options are too permissive to constitute an effective accountability mechanism and adequately control (imminent) abuse of power.

A different and more rigorous option that was considered is making animal trustees accountable to an external political body. Animal trustees then become answerable to a different political organ and have to account for their political choices and behaviour before this organ. This option, however, also could not offer a conclusive solution to the problem discussed here, for it would merely push the problem around. The reviewing organ would need to be composed of people who are truly invested in the objective interests of non-human animals. This “solution” thus merely shifted the problem to the reviewing institution: how can we guarantee that the people reviewing the animal representatives are objective and genuinely concerned with the true representation of non-human animals’ interests? This seemed impossible.

Yet another alternative was making animal trustees accountable to (constitutional) courts. The objectivity of courts is relatively uncontroversial in liberal democracies. This move, however, yet again raised more questions than that it offered true solutions. Who would be a legitimate author to formulate a set of instructions for animal trustees, which would have to function as a legal basis for this review and as legal guidance for the courts? How substantial ought the courts’ review be? How can we prevent a

situation in which courts are tempted or even required to make politically sensitive rulings and breach the separation of powers? Where do we find a legitimate, non-political, and objective source which can assist courts in determining non-human animals' true interests? For many reasons, accountability to courts was also considered highly undesirable, while also not being a solution to the challenge of mitigating abuse of power.

A last option to tackle this challenge could be to make animal trustees accountable to general voters (that is, human political agents). This could easily be done by asking voters to (also) elect animal trustees. We have seen, however, that trying to fix the accountability gap regarding animal trustees in this way increases rather than decreases the risk of abuse of power by animal trustees. Making animal trustees dependent on the votes of humans would be a stimulus to be responsive to *their* preferences rather than to pursue non-human animals' interests, and it would thus confront animal trustees with a strong anthropocentric incentive. General elections of animal trustees would, in other words, probably have the opposite effect of what we are trying to achieve with them: they would likely provoke abuse of power against non-human animals, instead of preventing and remedying it.

So, accountability to the human electorate also could not fix the accountability gap. This means that a satisfactory means of establishing accountability for animal trustees has not yet been found. This is a serious shortcoming, for it will become very hard to guarantee that animal trustees will use their power for the right ends if they are not accountable. We have, however, seen that other strategies of limiting the risk of abuse of power exist. In theory, it is possible to strictly regulate the selection of candidates for the positions of animal trustees by introducing selection criteria. The problem with this, however, is that the effectiveness of character selection strategies is disputable and that they bring significant democratic costs with them. Character selection strategies thus cannot offer a sufficient protection against abuse of power by animal trustees either. The challenge of controlling abuse of power thus also seems to remain a problem to which there is no clear-cut solution.

As a result of the fact that a general election of animal trustees would persuade them to act in accordance with the preferences of humans and thus substantially increase the already unacceptable high risk of abuse of power, it was proposed that if animal trustees were introduced at all, they should certainly not be elected by the general public. This move of detaching the selection of animal trustees from general elections again led us deeper into the swamp. It has three alarming consequences.

The first consequence of not having the general electorate vote animal trustees into office is that this automatically means that animal representatives and human representatives can no longer be the same people. It was argued in chapter two that introducing separate human and non-human representatives was not an implicit condition to the independence requirement. That is, so far, there was no principled reason to opt for separate animal representatives. The politicians we have today could, in principle, take up the task of representing other animals as well, if we were to succeed in introducing institutional mechanisms to make them do so. However, the conclusion that animal trustees can no longer be subject to human election changes this matter. It means that human representatives cannot simultaneously act as animal trustees, because the people executing the tasks of the animal trustees cannot be popularly elected. Since it is unwise to change the authorization and accountability mechanisms that work so well for human representatives (by making human representatives unelected too), this means that representing humans and representing non-human animals can no longer be done by the same people.

The fact that animal trustees and human representatives must be different people creates a yet new challenge, a challenge which is thus also an indirect second consequence of the initial choice to reject the general election of animal trustees. Now that we are compelled to introduce separate animal trustees, a new balance of power ought to be found. Political power must be transferred from old-fashioned human representatives to the new animal trustees, and the new challenge this confronts us with is that it must be determined *how much* power would have to be transferred. We have seen that this challenge is, yet again, unsolvable if we are to stick with the unassailable principle that both humans and sentient non-human animals

have the right to have their interests duly considered. Furthermore, we have seen that we must be careful not to create a legitimacy gap by giving animal trustees too many political powers, among which those which would enable them to decide matters that go beyond animal interests. This brings us to the last challenge.

The last challenge of politically institutionalizing the right of non-human animals to be considered is making sure that this enterprise will not incur overly high democratic costs. Two realistic potential democratic costs have been identified, both related to the choice of detaching the selection of animal trustees from popular election, and they thus constitute the third consequence of detaching the appointment of animal trustees from general elections. First, if unelected animal trustees were able to decide matters which go beyond the interests of non-human animals, this would constitute a democratic cost, because they are not democratically legitimized for such matters. The political patiency of non-human animals means that they cannot offer their trustees guidance on these matters, and trustees thus lack legitimacy on such matters. In theory, this democratic cost could be avoided by not assigning animal trustees the political power to determine matters which go beyond the interests of non-human animals. We have seen, however, that making the competences of animal trustees conditional in this sense would hardly be a solution, because it confronts us with the seemingly unsolvable problem of having to find an objective party that can determine whether the respective condition is fulfilled.

The second democratic cost is inherent to introducing unelected animal trustees. This democratic cost is losing some amount of popular control over state governance. If animal trustees are not elected by the general public, the appointment of animal trustees will necessarily become a matter of (s)election by fewer people. This amounts to a loss of popular control, for the political power given to animal trustees will no longer be subject to the will of the general public, nor will it be controlled by the general public. Society's grip on state governance will thus weaken in accordance with the amount of power that will be assigned to unelected animal trustees. This is a serious problem, because popular control is an absolutely essential aspect of liberal democracies. There seems to be no

solution to this problem, because what is minimally required for counteracting abuse of power and securing a non-contingent and due consideration of animal interests (namely: assigning significant powers to unelected animal trustees) is in direct conflict with what is required for upholding an essential facet of liberal democracies (namely: maintaining popular control over governance). This leaves us with yet another challenge unsolved.

### 3.3 Conclusion

In this chapter, the opportunities and challenges of institutionalizing non-human animals' consideration right in the political sphere were explored. The previous recapitulation, which interconnected the different findings of this chapter, paints a troubling picture. In chapter one, we have learned that the mere fact that non-human animals are political patients does not mean that they do not have democratic rights. In this chapter, however, we have learned that their political patiency most likely *is* a crucial obstacle in giving practical effect to their consideration right in political institutions. Enfranchising non-human animals politically would require us to dive into an ambitious project of political trustee representation, but many challenges regarding this project yet remain unsolved. Without solving these challenges first, politically enfranchising non-human animals by way of introducing powerful but unelected animal trustees seems unwise. Not only would it be far from ideal in light of the enfranchisement criteria, but it could also seriously affect the "limited government" aspect of liberal democracies and even the long-term stability and sustainability of liberal democracies.

A deeper analysis of the political sphere of liberal democracies makes it unlikely that the noted challenges can be solved. Political institutions in liberal democracies seem to be founded on the fundamental anthropological assumption of the rational and self-serving individual with political agency. Political institutions and their intermediate checks and balances are designed and have evolved in such a way that they are effective if the people occupying them try to pursue their own interests politically. As such, the political institutions of liberal democracies have no pretention to be any more objective, fair, or balanced than is required for providing political

agents equal chances of pursuing their own interests in the political institutions. This fundamental focus on the selfish and politically autonomous person means, however, that there is some fundamental discomfort between the political institutions of liberal democracies on the one hand and the political position of political patients on the other hand. One only needs to think of the political position of children, comatose humans, mentally ill people, and people with extremely low intellectual capacities to notice this discomfort. Put bluntly: in the political institutions of liberal democracies, political patients are, in principle, always one step behind. The noted problems related to the enfranchisement of non-human animals in political institutions must be understood against this background of a persistent and fundamental unease between political patients and liberal democratic political institutions.

It seems overly naïve to expect that an equal, independent, and non-contingent consideration of non-human animals' interests can be achieved in this political arena, which has no place for political patients and where objectivity does not seem to be a rule of the game. The normative theory of this book requires an objective interspecies weighing of interests, but this objectivity can never be acquired in a context in which merely political judgments are made by political agents who are institutionally expected to act in their own interest. The political nature of these judgments implies a certain automatic priority for human-ness, political agency, autonomy, and selfishness. Expecting complete objectivity in the weighing of different interests in the political arena thus seems to expect the impossible. Pulling some occasional strings in political institutions will not help us here, because this cannot alter the fundamental rules and structures of the game that is being played in the political sphere. Politics is, one way or the other, a business of competing subjective self-interests, and the ground rule is that one stands up for oneself if one is to be taken into political consideration. This quite fundamentally puts political patients well behind.

The lack of objectivity and the neglect of political patients in *political* institutions do not mean that liberal democracies *as such* lack objectivity and a due regard for political patients, however. When we yet again consider human political patients, we notice that their incompetence to politically

participate do not render them second-class citizens, which is due to legal corrections. Crucially, the initial broad lines of democracy, which may initially disadvantage political patients, are compensated by legal institutions, which right initial wrongs done to political patients. One of the great assets of liberal democracies is precisely the combination of and interaction between the political and the legal sphere. Combined, they establish something like objective regard for, and equal treatment of individuals. It is precisely the compensating assets of the *legal* institutions which ultimately establish something close to objectivity, equality, and due regard for initially disregarded individuals, such as political patients.

In this light, it seems clear that the political sphere is not the place to look for objective judgments about the interests of animals. In other words, fair decisions concerning the interests of non-human animals are not likely to emerge by enfranchising them in the political institutions. We might, however, consider institutionalizing animal interests in the legal institutions, which seems a more logical choice in light of the foregoing. The ground rules of the legal game resonate much better with our enterprise of enfranchising non-human animals. In the legal sphere, processes and actual institutions are directed by long-proven principles of justice, which are, through our constitutions, also presumed to be democratically backed by society. Legal rules, judgments, and institutions are required to be objective and impartial, they ought to respect the equality principle (as applied beyond political agents), and they ought to give due regard to the interests of individuals—even if they cannot stand up for themselves. The law itself and Lady Justice’s blindfold forces objectivity on purveyors of justice: they must be free from political motives and they are not to be led by private opinions and self-interest in their balancing of interests, nor may these be reflected in the decisions in which this balancing results. As will be argued in the remainder of this book, such legal objectivity should and could also imply objectivity with regard to the species membership of individuals and thus require agents of justice to not let any species bias seep into legal judgments. Crucially, these to the enfranchisement of animals highly relevant principles are already engrained in the legal sphere, and so it will not be necessary to artificially bring about objectivity and due regard for

political patients in a context in which it simply does not fit. It is much more likely that the criteria for non-human animal enfranchisement will be met if we merely extend protections that the law already offers to non-human animals. It thus seems fruitful to now leave the terrain of the political institutions and move on to that of the legal institutions.