

Anthony Comegna ([00:20](#)):

Happy election day, everyone, depending on when this episode actually pops up in your feeds. And yes, I'm of course saying that tongue firmly in cheek, it is of course, extraordinarily difficult, if not impossible for me to find anything to be very happy about on election day, and even more so here in 2020. But whatever your activities, thoughts, reactions, or prayers are like today, we have a very special show that might well put your mind at ease, at least for a half an hour or so. Today, we're joined by Professor Joshua Kleinfeld still fairly hot off his recent TEDx talk, which of course you can find on YouTube under the title Democracy and the Pandemic.

So thank you so much, Professor Kleinfeld for being here. And I heard your TED Talk because our show's producer, Sean, put me in touch with it and said this would make some really good material for the show. And you're so bullish on democracy. It is on the one hand, very inspiring. I'm a historian of Jacksonian America. You can't help but love some things at least about democracy. But then again, we're recording here on October 22nd. We all saw that first debate or at least heard enough about it by now. We know the second one was canceled. The third one's coming up tonight, I think, I guess, right? And boy, this is coming out on election day or very near it. Things don't exactly look great for democracy right now. So maybe you could tell me why I'm wrong.

Joshua Kleinfeld ([02:06](#)):

I am more optimistic than that, but I acknowledge that democracy is ailing. American democracy is ailing right now. But I think there's reason for hope. One is that democracy everywhere isn't ailing, democratic governments continue to flourish around the world and flourish with respect to their response to this pandemic. There seems to be something amiss in our country and that's a problem of the first order, but it doesn't give us reason to think that democracy isn't a good form of government. Gives us reason to think something's gone wrong in the United States. And yet I think even with respect to the United States, we can be unduly cynical.

COVID hit during President Trump's presidency. And if the American people judge him to have handled the pandemic poorly, the big chance for them to kick them out of office and replace him comes on election day. Not before it, but on it. And so the accountability for bad decisions that is one piece of the democratic puzzle doesn't happen right away. It doesn't mean that we will respond optimally to crises or bad events. It means that when our political leadership errs with respect to big events, we have a chance to correct the error.

Anthony Comegna ([03:39](#)):

Well, I think, of course that's true in some sense, at least. I mean you can of course debate how effective a vote is and I consider myself a principled non-voter. I choose not to vote essentially for the grand old American tradition that I choose not to consent to this government, either in form or in function. So, I withhold my consent to be governed by this beast. And I take that to be fine and not too many people want to argue with me about that. But I do wonder, is this actually a chance for people to express their opinion about COVID in particular?

But we'll come back to that, because most of your video, your TED Talk was really focused on comparing different types of regimes and their relative strengths in a period of crisis like this. Of course, there's going to be crises and practically every regime touched by something like COVID, but they respond to it in different ways and that might make all the difference. So you really talk a lot especially about Chinese authoritarianism versus American democracy. So maybe you could just sort of overview

that debate for our audience here. And I'm also wondering why people see this in particular as an opportune moment to talk about comparing regimes like this.

Joshua Kleinfeld ([05:10](#)):

The pandemic is like a stress test of all the governments of the world. So when we think about forms of government, regime types, one way to think about them is, do they uphold our basic values? Democracy has always been associated with equality and we could be Democrats and the small descents. We could support democracy because we care about the values of political participation and equality it represents. But at the end of the day, people care about results. Can your form of government produce prosperity? Can it win wars? Can it address crises? Can it manage a pandemic? Ideas are tested by events. We recently concluded a period of utmost optimism about American democracy. 1989, the Berlin Wall falls and America emerges the victor of the cold war. American style democracy seems to be flourishing and it's a moment of utmost optimism and hope. And it affects the entire world. In the mid '70s, fewer than a third of the world's countries were democracies. And by the early 2000s, most of them were.

For years now, that hope has been fading. And America has seemed to flounder in the face of a whole series of policy challenges while other countries in particular most visibly China reject democratic forms of government and flourish economically. So, American democracy seems to be floundering and at just this moment, the whole world faces a common challenge, a common test, the pandemic and our response to it. And China is the origin point for the pandemic but seems to have dealt with it reasonably effectively so far as we know. There's a lot of caveats there because there's a lot we don't know, a lot of information that's hidden. But the United States seems to be performing pretty poorly with respect to the pandemic. And naturally, we look at our own country, compare it to other democracies or other regime types or most vividly to China and say, "What's wrong with American government? Why can't we seem to deal with the problems that arise and that, to some extent, government exist to solve?"

It's part of a larger pattern. I'll just end by saying this, that some people think it's just the man in the White House. The problem is President Trump and if we had whoever your choice is, maybe it's Obama or Hillary or Romney or whomever else, all would be well. I don't believe that for a moment. I think that the problems we face with American democracy are systematic and structural, and that our difficulty in addressing the pandemic is part and parcel of why we can't get better schools, why we can't get guns out of the hands of unstable people, why we can't fix our infrastructure.

Recently, I had the depressing experience of going back over state of the union addresses from my childhood to the present. And it is astonishing how few of the problems that were brought up in my childhood had been solved, how many of them just repeat year after year after year state of the union after state of the union. So this pandemic is a dark moment of realizing how badly our form of government is fairing right now when it comes to challenges.

Anthony Comegna ([08:57](#)):

We know. That's really interesting you bring that up because I was going to say a stress test is as you put it is not necessarily a good test. Almost by definition, a stress test is testing the limitations of something in extreme cases. Will it break and buckle or will it hold? But it's not telling you much at all about how a regime handles normal times, which would seem on the whole much more important. I'm sure you don't necessarily, if you're looking for the high score at the end, you don't want the regime to collapse at any point, whether a stress test or not, but normal times seems to be the real test of a type of regime, authoritarian or democracy of their effectiveness.

Joshua Kleinfeld ([09:51](#)):

That's interesting. I was thinking of it in terms of the larger thesis that ideas are tested by event. So, I was thinking of it in terms of the question of whether your regime can solve problems, address crises, manage challenges, produce prosperity. I was sort of lumping those together. I think you point out an important distinction between it could well be that some regimes are really good at dealing with crises and not so good at dealing with normal life, and other regimes are better at the one and worst at the other. You could imagine, especially with the pandemic, if what you need with respect to an infectious disease is a massive shutdown, it's not really surprising that authoritarian governments are good at that because massive impositions of state power are what they do best.

So, it could be that this pandemic is exactly the wrong kind of challenge for American government. But I think even if that's so, the point you ended on is true. The point you ended on is that you don't want even a democratic rule of law regime that flourishes in ordinary times and struggles with challenges, when it can't buckle at times of crisis and challenge, it has to fare well enough.

Anthony Comegna ([11:12](#)):

Well, I said that's if you're trying to get the high score. And since I'm a video gamer, you usually pick a regime. You pick a country, a ruler or something and you try to make it to the end and get the high score. And if you collapse for one reason or another, it doesn't really matter. You're not going to win and you've lost the game. So from the perspective of the regime at least, that's what they want to do. And you can topple in normal times or in extreme time. So, that's ... normal times can quickly become extreme because normal times suck is kind of my point. But that's kind of the sense I got from you that, well, it turns out in this time of pandemic, we've been seeing not just poor response to an immediate crisis, but all of the other problems that exist out there that just compound at this moment.

Joshua Kleinfeld ([12:05](#)):

I think that's right. I think a lot of the problems that availed American democracy for years are sort of exhibited in our response to the pandemic. I mean, on that note, my TED Talk, it is meant to be analytically rigorous but also to project hope. And that's sort of the assignment of the TED Talk is to give some reason for hope in times of hopelessness. But my views are a little bit more nuanced than that. It's not that I think all is well. It's that I think the solution to what ails us is more democracy, not less.

Anthony Comegna ([12:58](#)):

Yeah, and you also mentioned the increasing number of democratic regimes in the long run here, but as we learned or at least as I learned, I don't remember exactly if we discussed this explicitly or not, but from Marian Tupy at the Cato Institute, from his recent book about all these different trends that people should be aware of, in recent years, just the past few years, democracies have been on the decline in raw numbers. So, what do you think about that or what do you take away from that? Do you think the pandemic is likely to exacerbate that small trend, that recent trend?

Joshua Kleinfeld ([13:35](#)):

Yes. I think that's a clear yes. We saw a period where democracy flourished after America won the cold war. And now we're in a period of ... Larry Diamond has labeled it democracy recession. A period where there's a reversal of those lines where democracy seemed to be going in decline in multiple ways. Some borderline regimes are flipping from the democracy column into the non-democracy column. And some stable democracies are becoming less democratic in certain respects. Also, democracy just isn't

performing well not just in the United States, but in at least some other countries. For example, a lot of Latin American democracies have been unable to maintain basic social order. Indian democracy has been unable to achieve prosperity at the same scale as China. And so, there are some or reasons why the world seems to be in a moment of grave doubt about democracy. Actually, you know what the most distressing is evident just in our conversation?

When I speak as a professor to others about my faith in American style democracy, I am astonished at how few people agree with me. The mood of the country, our country, not other countries deciding whether to be democracy but our most politically engaged citizens is one of cynicism about American style democracy. And I find it difficult to talk people out of their cynicism. And I also think it's striking that I should have to talk people out of their cynicism. That this sense that whatever is good about government, democracy isn't where it's at or American style democracy is not where it's at. Maybe it has to do for someone like you with individual liberty, for someone else with justice, but a few seem to think that a robust form of democracy is the center of good government. I do. I do. I think that among the many things you can prize utmost democracy, utmost justice, utmost liberty, democracy is the one most to be prized.

Anthony Comegna ([15:56](#)):

Well, to be perfectly frank, I think my cynicism comes from just spending too much time with it. Over 200 years or whatever it is that my field encompasses in all, it's been too much. I've seen too much rot in the system. You know what I mean? Generation to generation. Most people only have their own generation and maybe their parents' generation as reference points. So, [inaudible 00:16:27] goes deep.

Joshua Kleinfeld ([16:28](#)):

That make your view and your cynicism based in real scholarship. And I respect that.

Anthony Comegna ([16:28](#)):

Well, I appreciate that.

Joshua Kleinfeld ([16:34](#)):

[crosstalk 00:16:34] When you take the long view, don't you see some sort of fundamental story of success that has risen to a series of occasions and emerged as a cradle in which a huge number of people live good lives and an international powerhouse?

Anthony Comegna ([16:59](#)):

Yes, I certainly do. And that's part of the tension that I think at least drives a lot of my own thinking about these things. That unquestionably the system has given us tremendous advances. I mean, just like Tom Paine said about the revolution itself, it utterly smashed monarchy and made it completely ridiculous. And if God had intended monarchs to rule over us, he wouldn't so often have given us asses instead of lions. He just smashed it. And there's no question that the world is better off having done away with something like feudalism and slavery and other things. These are all triumphs that we should really prize, but the costs are tremendous also. Like the 20th century being the absolute height of slavery and forced labor in world history, with World War II. So, it's a complicated tension. And that kind of leads me into my next question, which is, well, what kind of responsibilities does China as a nation state bear for this current global crisis? And what do you think global democracies are going to do, if anything, as a response to the way their regime handled the outbreak?

Joshua Kleinfeld ([18:22](#)):

Those are really two questions. One's about Chinese responsibility and the other is about international responses. As to responsibility, I think any society could be the origin point for a disease, but what's striking in the wake of the disease is the amount of secrecy and misinformation. And there's some reason to think even disappearances from China. So, we sort of think that China is doing a good job of containing infection rates, but we don't know that for sure, because we can't trust the information we're getting. And we sort of think the virus started innocently in a market near Wuhan, but we don't know that for sure. And some of the information seems to be missing.

And my basic perspective is that being a place from which a disease starts is not a wrong, but lies and cover-ups are. And I think when we think about China's responsibility, we shouldn't blame them for the disease, but perhaps we should hold them responsible for a response that wasn't forthcoming, honest and information sharing.

In terms of the international response, I don't think there's much anyone can do. I mean, the realities of power around the world are such that regardless of whether China is in the wrong or not in the wrong or was in the wrong in some respects at the pandemic crisis, American corporations was still on access to those markets. The American government will still be engaging in it's very complicated and delicate dance of cooperation and competition. And I don't imagine there are any effective international tools for sort of holding China to account.

Anthony Comegna ([20:38](#)):

So speaking of holding China to account, you do give us in your talk three reasons for hope. And I kind of want to take issue with each one, because as you might've gathered by now, I'm not a terribly hopeful person. I feel like I'm long run optimistic, but I'm optimistic for reasons that we don't even know right now, it will ... the reasons for optimism will surprise all of us and emerge spontaneously and all of that. But the things I see in front of me right now, I'm not optimistic at all.

And so you say that this, the first reason for hope is that the upcoming election, the one that we're experiencing as the show goes out right now is possibly the first pandemic based referendum opportunity we have at the ballot box and that there will be accountability, that that's a hallmark of democracy and so this is people's opportunity to hold their representatives to account for pandemic response like they haven't had before. But my point to you or my question to you is, does it really work that way? Because once they get your votes, they don't actually have to be accountable for anything except to each other, you know? So, does it really work that way? Should we really expect accountability however it turns out?

Joshua Kleinfeld ([22:02](#)):

Well, elections still matter. I don't think they're sufficient for a robust democracy, and they're flawed. For example, we don't actually have ... You framed it as a referendum on the pandemic. We don't have a referendum on the pandemic. We have a choice about which representative to select to deal with the pandemic and a variety of other issues. And there are going to be people who would like someone very different from Biden or Trump with respect to the pandemic, but favor them for sort of a basket of other reasons, just because of the nature of American elections for representatives, they're rarely sort of one issue affairs. And so, I don't want to deny those limitations, but elections do basically work.

Here's a hypothetical. If America's response to the pandemic had been the envy of the world, if it had controlled, even solved the problem of the pandemic and done so while maintaining reasonable freedom and economic prosperity through the brilliant leadership of the president, if that president

were Trump, would he win election again? Would he win a second term? I think the answer is a clear yes. And if he loses, will one major factor, maybe the major factor be that he blew the pandemic response. And again, I think the answer is a clear yes. So, elections are sacred and they're working. They're not enough, but they're working.

Anthony Comegna ([23:42](#)):

Well, the second reason for hope that you offer is that in a democracy, there is no ruling elite that's allowed to just brazenly pursue its own pet personal interests. And without being too flippant, my question to you is, wait, really? It really has ... because I mean, come on, we have a political class. I mean, how many of those people have been there forever? They've never done anything else. Joe Biden is a perfect example of that. Trump is a perfect example of the corruption and the glad-handing of businessmen and politician. I don't know about that. No ruling elite in a democracy, that sounds like Newt Gingrich's style of American exceptionalism.

Joshua Kleinfeld ([24:31](#)):

Well, that's not quite what I said. What I said is in a fully functioning democracy with true self-government, there is no ruling elite. In America today, there is and it's a problem. And what that shows is that one part of our democracy is working and another part isn't. The elections and accountability part is working. The true self-government part is emphatically not working. That's why I say the problem is that we're not democratic enough. We actually do have a ruling elite or a sort of ruling class and there are differences within the ruling class, and every four years, there's a competitive struggle for the people's vote, but that isn't genuinely representative government and it certainly isn't self-government. It's what Schumpeter, the political theorist, Joseph Schumpeter characterize as a competitive struggle for the people's vote in regular elections, but in true self-government, something very different would happen.

A state action would genuinely reflect the convictions of we, the people. I think there are three criteria for that. Citizens, political preferences and beliefs would be formed in conditions of reasonable freedom. That is there'd be extensive freedom of speech. There'd be active deliberation. That'd be disagreement to be sure. I don't imagine for a moment that what would emerge from genuine deliberation would be consensus. But over time, I do think a majority will tends to form and then state action would reflect the will thus formed. And it would have to because citizens, political preferences and beliefs would have causal force, they would have the power to compel state action to reflect their convictions.

We could imagine a country like that. We could imagine a country where the question of, should we lock down, should we shut down in response to that pandemic and how and to what extent should we do so is a question for genuine democratic deliberation. And upon that sort of deliberation or after it takes place efficiently, state action is taken that reflects our convictions. That could be for example a referendum system. There's no reason why we could not in principle have a referendum on the lockdowns and have them maybe not immediately when the situation was as fluid as it was in the spring, but maybe have them at some point over the summer. And we could also imagine a system by which our legislatures would create law about the lockdowns and do so in response to citizen pressure.

What we in fact had was government by executives, mayors, governors, and to some extent the president and vetoes by the judiciary. So what we saw in our pandemic response process was the failure of true self-government, not the realization of it.

Anthony Comegna ([27:51](#)):

Well, I love the way you responded to that. Because I feel like I have to ... my job here is to ask the tougher questions if I can, but that was a perfect response because that's actually the thing that makes me so sympathetic to democracy when I do my historical readings in Jacksonian America for instance. These people have a real deep and abiding faith in what they're doing, because they know it's done by their own hand, in their parents' hands, in their grandparents' hands like from Valley Forge to Tammany hall, they're doing it all themselves and they have a real deep sense of that. It means something. So they need to protect it. And these Jacksonian see the existence of a ruling elite as evidence that their democracy is not functioning properly, you know? Like you [crosstalk 00:28:40]

Joshua Kleinfeld ([28:40](#)):

We use some modern day Jacksonians in that sense because we have a system at present where we can identify individual members of the ruling elite sort of in advance by the schools they graduate from, their incomes. The governor of my state, Illinois, is just a rich guy with a lot of inherited wealth who decided at some point in his life he wanted to be a governor. We're seeing an, what I imagine is an increasing extent, I guess I'd want to empirically verify that. We're seeing a great many cases in which power is being handed off among families. So, Bill Clinton wins the presidency makes Hillary Clinton a senator, and she has effective control of a part of the Democratic party and so is a perennial presidential candidate. Now, it's Joe Biden's turn. Michelle Obama is a viable candidate. The Bush's hand power amongst themselves. We undoubtedly have a ruling elite and it's a large part of the reason why these processes of self-government are breaking down.

I want to mention one more thing about that. And that is that when it comes to the lockdown, there are so many sacrifices to be made on any decision. If we decide to accept a certain amount of medical risk in order to maintain ordinary social life and a flourishing economy, there will be a lot of sick people and some death as a result of that decision. And if we decide we want to maintain minimal medical risk, there'll be an enormous amount of economic sacrifice and sacrifice to the ordinary pleasures of social life.

And when you have decisions that involve great sacrifice, that's when we need to feel the most democratic ownership of those decisions regardless of whether we make them correctly. Those decisions need legitimacy rising even to the point of the feeling like you said with the Jacksonians that they are decisions taken by we ourselves. And I think part of what has gone awry is that the decisions are such command and control from the top some concatenation of members of the ruling political class and experts that the American people don't feel a sense of ownership of the sacrifices.

Anthony Comegna ([31:21](#)):

Well, I wish we could end it there because that was just so great, but I can't let you go without asking you about your third reason for hope, which is that the American government, perhaps again, when functioning properly is constrained by the rule of law and the division of power is one of which of course is the people's power to toss the bums out every so many years. But as we've been hearing so much of the narrative up until now has been about the possible challenges to the rule of law, the division of powers, the peaceful transfer of power. If there is any threat to the peaceful transfer of power or the rule of law, how do you recommend people respond to that?

Joshua Kleinfeld ([32:09](#)):

Well, I'm answering on October 22, that's the day of recording this, but I'm aware that it will be released right around election time. So whatever I say could be falsified upon saying it. But I think the fears that we won't have a peaceful transfer of power in this election are overblown. And we need to be aware of

excessive cynicism. We have had as a country 228 years of unbroken four year election cycles. I think it's extremely unlikely that that two century plus record will be broken in 2020 and will have genuine substantial and lasting resistance to the peaceful transfer of power. We might have some litigation. We might have dispute, which we've had before, but genuine lasting even armed resistance to the peaceful transfer of power I think is extremely unlikely. And if it should happen, in that unlikely event, I would hold to the principle that elections are sacred and we have to fight for them.

Anthony Comegna ([33:22](#)):

All right. Let's close out here. What do you think is the strongest pitch? Given everything that we've been talking about here, what at this moment is the strongest pitch for democracy that you can make to somebody like myself, a market oriented but definitely voluntarist, individualist, anarchist? How do you pitch democracy to me?

Joshua Kleinfeld ([33:47](#)):

Some decisions are inappropriate for libertarian decision-making, and the pandemic decisions are a case in point because of the massive externalities imposed by infectious disease. Let's say one person or some people decide to be risk loving. They think life presents a lot of risk and they are not going to be highly restrained by this infection. With their decision to take on that amount of risk has infection implications for everyone else. So there are lots of things where we can allow one another to enjoy our freedom sort of on the principle that your freedom to swing your arm stops where my nose begins. Infectious disease is one of the rare cases of a case where my nose sort of begins as soon as you start swinging your arm.

And so when you're faced with one of those decisions, when you recognize that you're in this special case where libertarian individualistic decision-making is just inappropriate, just a bad fit for the problem and you need to have a collective decision taken, then you face the problem of who should govern, who should be taking that decision. And so what I submit to you is that the answer when you have to take a decision like that is the people, the majority of the people, partly because the people as collectives, the American people as a collective exhibit a great deal of practical wisdom, especially over time, partly because the alternatives are so bad.

The question is always compared to what, and in this case, compared to what would be some of ruling elite or expert class that I think would mislead us. And partly and this is maybe the main theoretical point I want to communicate to someone of your libertarian predilections, partly because democracy itself is a form of freedom. It is not individual freedom. It is not the negative freedom of being able to behave as I wish in ways that do not affect you, but it is the freedom to participate in government and therefore not to have anyone ruling over you.

Anthony Comegna ([36:15](#)):

Joshua Kleinfeld is a professor of law at Northwestern's Pritzker School of Law, where he specializes in political, legal and moral philosophy, criminal law, criminal procedure, and legislation. He's practiced law for Northwestern's Juvenile Criminal Defense Clinic. He's been a visiting professor at Harvard and Stanford, and he has an extensive and impressive history as a law clerk on the Fourth Circuit and the DC Circuit Courts of Appeals and even the Supreme Court of Israel. Now, that's not one hell of a resume. So if you like what you've heard here today, be sure to follow it up or with Professor Kleinfeld's TEDx talk Democracy and the Pandemic, and no matter what the results are that keep trickling in over the next few weeks, let's each double down and do what we can to, you guessed it, keep the progress coming.

