

All Ears with Abigail Disney
Season 2 Episode 12: Emily Bazelon
A Full-on Reversal Or An Incremental Hollowing Out For *Roe V. Wade*?
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Abigail Disney: I'm hearing an echo.

Emily Bazelon: Do you want me to turn down my--does that help?

Abigail Disney: Echo, echo, echo, echo, echo. No, I'm not hearing it anymore. Good. You fixed it. Wow. We add that to the list of your talents.

Emily Bazelon: I feel like this is basically the big thing I've gotten out of the pandemic is I actually have learned how to use my tape recorder. Like that's kind of it, but it's actually really helpful.

Abigail Disney: I'm Abigail Disney. Welcome to All Ears, my podcast where I get to go deep with some super smart people. This season I'm talking to "good troublemakers:" artists, activists, politicians, and others, who aren't afraid to shake up the status quo. We'll talk about their work, how they came to do what they do, and why it's so important in hard times to think big. You can't think about solutions without being a little optimistic and, man oh man, I think we need some optimism right now.

Abigail Disney: So, let's just jump right in.

Emily Bazelon: No problem.

You're Bazelon or Bazelon? Let me get that straight.

Emily Bazelon: Bazelon. Yup, you got it right.

Abigail Disney: Oh, great I got it right the first time.

This week, one of my favorite writers, Emily Bazelon. Emily's a Staff Writer at The New York Times Magazine and a frequent contributor to their op-ed page there, but mainly she's an exquisite explainer. She's put into words a lot of the things I could not quite frame for myself about how the law and the courts have a real and sometimes devastating impact on the circumstances of actual people--especially those without access to power. Emily's most recent book, *Charged*, is a NYT bestseller about the inordinate power of prosecutors in our present day legal system. She's also the Truman Capote Fellow for Creative Writing at Yale Law School, and co-host of the very excellent Slate podcast Political Gabfest. Emily devotes much of her substantial

brainpower and talent to analyzing the political, cultural, and legislative attacks on women's reproductive rights, and that was one of the things I was eager to talk to her about.

But--BUT!-- we recorded this podcast last week, on Wednesday morning, right after the Georgia runoff and yes, it was that Wednesday morning. Do you remember Wednesday morning? It was a time of innocence, when people like you and I thought that we could talk about the normal horrible things. I mean like stuff like this:

Emily Bazelon: And you're talking of course, about President Trump's phone call to Brad Raffensperger, the Secretary of State in Georgia.

Abigail Disney: Yes. Exactly. Exactly. The phone call! Did he break a law?

Emily Bazelon: I think that he got right up to the line and that you could argue that he broke a law, both a state statute, which says that you're not supposed to basically solicit or entice public officials into falsifying returns or, you know, monkeying with the result of election. And there's a kind of similar federal law.

Abigail Disney: Ah, the phone call, remember when we were talking about the phone call? It feels like a million years ago, but when President Trump is in The White House, there's no mute button and the volume never drops below 11. But I still wanted to share this conversation I had with Emily last week because despite all the noise and clamour and treason, all that we discussed, especially about reproductive rights, still matters greatly. We started out talking about voting rights advocate Stacey Abrams, who emerged as the Democrats' hero and the Republicans' villain in the Georgia run-off. As it happens, Emily went to law school with Stacey, and had witnessed her charisma and political talent up close before any of the rest of us had the chance.

So, with no further ado, here's me and Emily, and I hope that you enjoy the conversation as much as I did.

Abigail Disney: So you went to law school with Stacey Abrams, is that right?

Emily Bazelon: Yes, that is true. I know Stacey from law school. I admired her a great deal in school. I remember taking a class with her where there weren't a whole lot of women who are kind of regularly raising their hands and talking and I kind of noticed we were both doing that. And I remember, Stacey can be a kind of quiet person but she has a lot of authority and magnetism. And so I thought it was evident even then that she was someone who was going places and particularly had a political future.

Abigail Disney: Right, right, so what do you think about her political future, where is she headed?

Emily Bazelon: Well I mean I haven't I have no inside information but it seems like she wants to be governor of Georgia and may well be planning to run for that office again in 2022. And you know, I'm just struck by how much foresight she had.

You know when she started talking about building a coalition of voters of color and liberal voters in Georgia 10 years ago it just was really hard to see how that was going to happen. The South seemed so Republican there was such an entrenched sense that that was just an expected feature of Politics in her state. And I think it was hard for her to get attention and funding in the beginning because democratic donors were pretty traditional and they weren't used to thinking of the kind of turnout argument as opposed to the persuasion argument about you know getting more moderate voters that traditionally Democrats have tried for. And I think that you know she was just really convincing patiently over time and you know just watching her as as a friend it's kind of amazing to see someone be so determined and think so long term and then have a goal achieved.

Abigail Disney: And what she did, investing, you know, a decade in in turning a state, is basically it's been the right wing way of organizing for half a century now. And this is what Democrats consistently fail at, they keep looking for the payoff six months one year two years out and they don't invest long-term in building constituencies.

Emily Bazelon: That is absolutely true and, you know, I'm sure you know this but, when you see this Republican takeover of a lot of state legislatures in 2010 what you're seeing, right? They're like reaping what they sowed and all this paying attention to lower office. And I think we did not really see attention to state and local races. You know, even from President Obama. It is tiring work, it's kind of invisible, I mean Stacy. Right? It's like now she is this icon and this figure and she's getting a ton of credit, and she should be but she would also I'm sure say that there are lots of other people, other black women.

Abigail Disney: Oh she consistently-- she's very frustrating to praise because she consistently says I couldn't have done it without this and this and yeah she's very modest.

Emily Bazelon: Right. But I think she's also smart to recognize all these other people who've done this work with her, right? Like the media, we tend to want the one figure it's like just easier for us. It's a story. People remember the individual, but she's right, there were all these people working alongside her and before her on this. You know, it's like hot sweaty very small work to go out, and like, anyway, it was invisible for quite a long time and now we're all paying attention.

Abigail Disney: Absolutely. And I think you're right but the fact that we don't know how to tell a story about multiple heroes or collective movements or movements that take a

long time and-- our weakness for telling stories has made us very weak at building movements, I think.

Emily Bazelon: That's a really important insight.

Abigail Disney: So tell me, does anything about the race yesterday surprise you or, are you seeing what you expected to see?

Emily Bazelon: I am surprised. I thought that the Republicans were going to win in Georgia because it's been a strong hold for them for such a long time. And I thought the Democrats were running good races, but I was not convinced it was going to be enough.

And what I think we have seen that's remarkable is that the attacks on Raphael Warnock and Jon Ossoff, the democratic candidates, which-- the kinds of attacks that have succeeded in the past, having to do with Warnock being black, Ossoff being Jewish, you know, trying to paint them as radical leftists as their opponents kept saying, it just didn't work this time. It fell flat. And I think we're going to spend a lot of this political season trying to sift through the tea leaves to figure out why, what has changed, what were the most important factors.

Abigail Disney: So I want to talk about abortion. In the runoff, Reverend Warnock deliberately didn't shy away from the issue of abortion. And I thought he had an interesting way of threading the needle on it, which was, simply to say I believe in life, but I also believe in choice, and the question is, whose decision is it? And, what's more, maybe we should be concentrating on the living children and men and women who are suffering right in front of us. It felt like an approach I haven't yet heard.

Emily Bazelon: Well it's interesting because the idea of you know, it's choice whose choice is it that's familiar framing. But I think you're right that the emphasis on living human beings is I what I hear an echo there of the reproductive justice movement which is long-standing it started in the nineties but I think it's gotten more and more attention and it's really trying to make a broader argument about equality and about who has the capacity to bear children, what kind of conditions do you need so that people can make free choices, like what does it even mean to have a choice really if you're making a choice that's very constrained by your economic circumstances for example is that really a choice at all?

And so I think there's a connection there between Warnock's framing and reproductive rights and justice which really comes from black women especially in the South as they're trying to make an argument for why it's so important to have freedom that also recognizes the problems people have really being free, if that makes sense.

Abigail Disney: Right. We had Loretta Ross on a couple of weeks ago she talked about reproductive justice and it's really interesting because you know justice is always a part of this conversation, it's just a very different orientation toward justice on the two sides.

Do you think that abortion has really been the glue that has held certainly Donald Trump's base together in an important way?

Emily Bazelon: Well I think that since the seventies or early eighties that Republicans have realized that abortion is a very powerful wedge issue. And there are voters who might on economic issues identify more with Democrats historically who see a really deep moral or religious argument for opposing abortion, which I think is heartfelt and comes from a real place.

I think it's important to recognize that and Republicans have successfully capitalized on that and that's politics, that's American politics. The question of how to move past that sort of frozen division is of course like one of the questions of the last generation. And I guess what I see in Georgia is some kind of transcending of that.

Now you know Georgia remains a place that there are a lot of deeply antiabortion voters I'm not sure how many of them peeled off for Ossoff and Warnock and it may be that we'll end up looking back on this year as like a kind of weird blip that was very much affected by the coronavirus and by president Trump's wild efforts to overturn the results of the November election. So I don't want to read too much into it, but it is important that these usual divisions that have been so helpful to Republicans in the South just didn't put them over the top this time.

Abigail Disney: You know the one of the reasons I call abortion the glue is that while they were conjuring almost like a trance about abortion over here, they were sort of slipping all this other unrelated stuff. And so you have people arguing for the policies that are making Elon Musk richer and richer and richer. And, and it's, it's been almost like a magic trick, um that where they've gone and they've distracted us with about abortion while they slipped in this other trick with another.

Emily Bazelon: I do think though that it's also possible, and there are some polling that suggests this, that people who are not wealthy themselves want to imagine that possibility, right? This is like the power of the prosperity gospel and a lot of evangelical churches and just like the power of the American dream. And so sometimes you have people who are not clearly advancing but they want to catapult themselves at least in their imagination into the status of the people who are actually reaping all the economic benefits in the way you're saying. So I just feel like that's an important factor in all of this. When you actually talk to people about why they're doing things it always tends to be more complicated and sometimes sort of self-contradictory, like I think that's true for

all of us. And I think sometimes we sort of forget that and have a kind of flatter understanding of people's political motivations.

Abigail Disney: Well, and that's why I continue to say that this isn't a question of whether or not you believe life is sacred It's about whether or not you think life is complicated and that there will be a different answer in every case for a different person, which is why you can believe in life and believe in choice at the same time because it's just not the government's decision.

Emily Bazelon: Yeah. Do you think that what you're talking about is that one of the struggles is how hard it is to legislate or write a court decision that reflects all of that complexity? You know, so I think about that a lot, that like when I talk to people about abortion they reveal all kinds of gray area and it doesn't completely add up. You know I think a lot of people feel like some abortion should of course be accessible but then they can imagine circumstances that they're uncomfortable with. It's really hard to define those circumstances, right?

Abigail Disney: And legislating and court cases are all about codifying and categorizing.

Emily Bazelon: And drawing lines around things that are very blurry. You know, some of the European countries in which abortion is not this incredibly polarizing divisive issue they do have limits but they also have ways generally around those limits. Like for example you know you have countries where in Scandinavia, The Netherlands where you have lots of access to first trimester abortion and it's true in the United States to the vast majority of abortions take place during that time. But then in European countries, if you're in further along in your term you sometimes have to Get special permission from a panel of doctors. You have to do something to get approval and so there's a notion that this society is judging you in some way. And we have not really allowed for those kinds of oversight in the United States. And there are lots of feminist reasons to be opposed to that kind of oversight, but I think it in some ways gives the public an out. I don't know. It's so hard to figure out how to resolve this.

Abigail Disney: Well and I don't know if the resolution is necessarily going to happen in the courts or in the legislatures. I mean this is a cultural clash.

Emily Bazelon: I think that's absolutely right.

Abigail Disney: I think that we can't resolve this until we get people at least on a similar wavelength when we talk about it.

Emily Bazelon: Right, or if we could figure out how to sort of right size it as an issue. And I guess that brings me back to this race in Georgia, like you know abortion politics similar all the time, but in this race they seem to be more in the background.

Abigail Disney: That's true. That's true. Yeah I didn't even think of that but it really didn't come up as much.

Emily Bazelon: I mean there are very pressing issues in the United States right now and maybe they were able to take center stage, you know both the medical fear and scientific problems of the pandemic. The government's failures, the economic crisis, and maybe those were able to really take up a lot of the attention that abortion often does instead.

Abigail Disney: You know I don't want--I'm with you on not wanting to read too much into the success in Georgia because it could well just be a blip. But you know I wondered when they succeeded in pushing Amy Coney Barrett onto the court if maybe they were ending Republican dominance in electoral politics because you know, it became suddenly less critical to the really hard right people to have that Supreme Court justice power again. Because they won, they won! This is what they've been shooting for all this time. I mean do you think that might be a little piece of what's in Republican minds?

Emily Bazelon: I mean that's really interesting. Are there people who were voting, and it was true in November as well, who are thinking like okay, we've accomplished that goal, and so now I can think about other things. I don't know I mean that's it's such an interesting question. You're certainly right that the Republicans have won in terms of the Supreme Court and also in terms of the lower courts. I mean I think that is going to go down as president Trump's big biggest accomplishment and it will be long-term and we are only at the very very beginning of seeing the implications.

Abigail Disney: And Amy Coney Barrett, her appointment of course in her confirmation felt like a terrible violation given that it was Ruth Bader Ginsburg's she was replacing. But but then so did Brett Kavanaugh's process too in the sense that you know he was just so very clearly outside of the mainstream. I mean this is not what the vast majority of Americans support. Am I right about that?

Emily Bazelon: I think you are correct that we have a very hard right majority on the Supreme Court. It's also true of Justice Alito and Justice Thomas and in some circumstances Justice Gorsuch that there is just a deep commitment to very conservative principles that I think is to the right of most Americans. And I should add Chief Justice John Roberts to that list on certain fronts too, although he has sort of emerged as the swing vote, that does not mean that he is a moderate person or judge.

Abigail Disney: They you seem to have designed this particular majority with an eye toward taking down Roe v Wade. Do you think that that is going to happen? Is this the time when we finally see Roe go down?

Emily Bazelon: I think that we're going to certainly see a narrowing of access to abortion, especially abortion clinics in the country. I don't know whether it is going to be a full-on reversal of Roe or whether it will be a more incremental hollowing out. My guess would be that it will start with the more incremental hollowing out, and so the court will start by taking cases in which States have banned abortion after 18 or 20 weeks not at Six weeks because that's just how you make law. You kind of set up stepping stones. The Supreme Court has rules--or doesn't actually have any hard and fast rules-- but it has traditions and customs about not overturning precedents. And you know these justices are savvy people. They understand what an earthquake it would be to outright overrule Roe v. Wade right away.

But we already live in a country in which abortion access is very limited for people who live in you know hundreds and hundreds of miles of certain States. It's just really hard to find a clinic that's open. There are lots of hoops you have to jump through, you have to make multiple visits, and of course that affects low income women the most. And so the question is like how much will that trend accelerate, I think that's like the big legal question. And then on the other side is the potential for expanding access to abortion pills which people are during the pandemic showing that they can really safely take at home. We're getting evidence about that from Canada from the United Kingdom and even from abortion friendly States in this country. And I am really deeply curious about whether that is going to change the equation.

Abigail Disney: I've been wondering that too but I don't understand why we haven't been as as advocates pushing harder for the distribution in the way that say Women On Waves do through the mail and in hidden Packages. And I mean there are ways to do this that have been working in countries like Peru and Ireland and other places for a long time why are we not pushing harder for that?

Emily Bazelon: Yeah, so this is such an interesting question I'm also really fascinated by it. One answer, and I don't think it's a complete answer but I'll start here, is that Women On Waves, which is a group that I wrote about a bunch of years ago, they have had a lot of success in distributing abortion pills in a kind of gray market way through the mail in countries where there isn't really strong rule of law. Right, so like you mail a bunch of packages to a country like Brazil and they're not going to like track everything and open the mail and prosecute the people who are getting it. And Women On Waves, I should say for some time at least was trying to help women access pills in the United States. But I think there are a lot of regulatory fears, and so when you talk about American doctors with American medical licenses one question is are you going to be putting your license on the line? That's a lot to ask for a doctor. How do you get around that? So there's a lot of regulatory thicket that exists in the United States that I think has created a lot of barriers to the kind of access you're talking about.

Abigail Disney: To go back to Roe for a second, I know, or at least I seem to remember Ruth Bader Ginsburg did not love the decision as a foundation for the right to an abortion. Am I right about that and why?

Emily Bazelon: Well, you're right that Ginsburg questioned the kind of legal basis for it. You know, Roe relied on the idea of a right to privacy and put a lot of emphasis on the right of a doctor as well as the patient, the idea that doctors have to be able to practice medicine in the way that they see best. And the right to privacy is not spelled out in the constitution. It comes really in this context from Griswold versus Connecticut which is a 1960s decision about access to birth control, but I think what Justice Ginsburg was saying is there was a better way to do this.

This should have been rooted in The Constitution's commitment to gender and sex equality she saw abortion as crucial to women's freedom that if you don't control when and the circumstances that you get to have a baby then you're not actually able to be equal. And that kind of jurisprudential underpinning for abortion rights is what I think she saw missing in Roe.

Abigail Disney: So if they are looking eventually to you know end Roe, to overturn it, what would the case have to look like?

Emily Bazelon: Well, so a bunch of states have passed laws that say that abortion is illegal once you can discern the fetus's heartbeat which of course is very early in pregnancy. Essentially these are complete bans on abortion and none of those laws have gone into effect. Well, you know the Supreme Court could take up an appeal of one of those laws and use that to just overturn Roe vs Wade. That would be the most direct way to do it.

Abigail Disney: So it's not going to have to be any kind of obscure thing. This could really come like a frontal assault.

Emily Bazelon: Yeah, and even if they don't start with that case, with a fetal heartbeat case, there are a bunch of cases waiting on the docket that are kind of side door into chipping away at Roe versus Wade, a kind of first step. And then the next case that comes along maybe overturns it directly or just effectively eviscerates it.

I mean some of the regulations that States have passed in recent years, they're called trap laws right, these laws that like set very onerous requirements for clinics so that they can wrap them in lots of red tape make it super expensive. If the Supreme Court really let those regulations go into effect you would essentially not have any real protection for abortion access in any state with a suite of those laws and we could expect like 20 or more States to have those kinds of restrictions. So I mean is that incremental or is that a direct assault? You tell me.

Abigail Disney: Republicans were interestingly cagey when they were nominating Barrett to the Supreme Court about overturning Roe. I mean I found them to be not as exuberant as I thought they would be about the possibility of ending abortion. Why do you think that was?

Emily Bazelon: When you think about the trajectory of conservative goals for the Supreme Court, The Federalist Society which was founded in the early 1980s has been incredibly successful at grooming candidates for the Supreme Court and for the lower courts that sign on to the Federalist Society's agenda. And that includes overturning Roe vs Wade or effectively eviscerating it. And so to me it just seems clear that the people who are choosing these Supreme Court justices have a very clear sense of what they're getting. And however cagey they were in the moment, I mean Amy Coney Barrett had signed on to public advertisements in which abortion was depicted in the most extreme terms. And she has made her opposition, her personal opposition to it clear. Now you know she would also say that she is going to decide cases as a justice in some way that she would claim is separate from her personal beliefs. But these kinds of cases before the Supreme Court, there is no machine that spits out the answer. The justices personal morals and values do absolutely inform the decisions they make.

Abigail Disney: I mean if Roe's overturned on the federal level state legislatures are gonna be more important and the folks in the state house has seemed to have been I don't know in a competition to think of crazier and crazier ideas for legislation. But Ohio just passed a bill that requires-- I love this I have a quote here: any zygote blastocyst embryo or fetus from a surgical abortion must be buried or cremated and that the pregnant woman is responsible for the costs related to the final dispositions. I mean I think this is really extraordinary. What do you do with that? If you're Amy Coney Barrett, if that is challenged all the way up to the Supreme court, what do you make of that?

Emily Bazelon: Well Indiana has a law like that, a requirement of burying fetal remains and it was challenged in 2018. And that challenge went to a three judge panel on the court of appeals of the seventh circuit and justice Amy Coney Barrett was then on the seventh circuit so the three judge panel that she was not a part of struck down this law requiring the burial of fetal remains. But then the state asks the whole court of appeals to review that decision and Justice Barrett voted to rehear the case. So that doesn't absolutely tell us how she would rule, but it is suggestive that she's open to this kind of restriction.

Abigail Disney: The dream on the far right is an amendment to the constitution declaring you know everything as human life. The personhood amendment. I mean that's the dream on the right. Do you think they still harbor that wish?

Emily Bazelon: I mean I think people who really believe that abortion is murder want fetuses to have the rights of human beings. So yes, I think in the anti-abortion

movement that is absolutely a goal. And it's a logical goal. If you think about it, I mean if that's your position, right? Like it's playing that out. That the issue is how far does that go? Does that mean that states that want to allow abortion actually would not be permitted to do so anymore and that it would actually become a criminal violation to perform an abortion or to have an abortion? That's the kind of like more, at least for feminist, dystopian end goal. And I think there is a lot of--well first of all, I think abortion opponents don't really want to talk about that because it's so divisive and unpopular and I think they are themselves divided on that front.

Abigail Disney: And they are very savvy when Donald Trump said yeah sure there should be a punishment for the mother. And of course that's very logical, if you're consistent about this of course there should be a punishment for the mother, except that they had already focused group that one. And they were furious with him for coming out with that because of course there was a huge backlash to it.

Emily Bazelon: Yeah I think you're absolutely right, I mean, that was Donald Trump saying the quiet part out loud because if you really want to end abortion that's what it would take. It would take putting lots of women in jail. It would take driving the procedure completely underground because we know that because we lived in a country where abortion was illegal until the 1970s. And there were some of those prosecutions as well obviously as death and suffering. So I think that you're right about that logical end point and you're also right that the anti-abortion movement knows that that is not something that most people really want to countenance.

Politically people moved away from that and started making these arguments that maybe they're more disingenuous or they're just taking another tactic right in particular this idea that women are victims of abortion and need to be protected. And so the justification for having lots of regulations is that they are supposed to be somehow promoting women's health and safety. I mean I think medically speaking that is a disingenuous argument and we've seen the American College of Obstetrics and Gynecology make that very clear in lots of briefs to the Supreme Court and elsewhere. But I think that's the kind of evolution of tactics that you see.

Abigail Disney: Yeah absolutely which goes back to the glue question. That's why I think it was so understood to be the thing that would hold everybody together, because it seemed like if you don't get this you won't get anything.

Emily Bazelon: And you know a few years ago before the 2016 election I was interviewing voters in Florida and for people who are low information voters, meaning they don't pay a lot of attention to politics, abortion is useful. If you know where you stand on abortion you just like make that the way that you pick your candidate. And I think a lot of people find politics so dispiriting and confusing and they're not like you or like me and kind of immersed in this all the time. They're really mostly just trying to like

block it all out and then they feel some obligations, some civic duty to figure out how to vote. Abortion kind of presents itself as this clear moral question. And I talked to a whole bunch of voters Latino voters in Florida who are really making their decisions on the basis of their opposition to abortion. And as I was making those phone calls I just thought to myself like this resonates in this way that other issues don't, and you know I think this year we saw people making different choices because of the urgent situation in American society.

Abigail Disney: I've always been interested in the ways that that the left is just as inconsistent as the right because everybody's always pointing out each other's hypocrisy. But on guns you hear on the right well this is what the Supreme Court says and this is what the constitution says and you know I don't care what you think is right or wrong this is the way it is.

But if you turn it around you kind of get the same thing from lefties. They say well the court has ruled on abortion so we need to stop talking about that and I keep wondering like in terms of activist judges what's the difference between say using the constitution to overturn Plessy versus Ferguson or to protect the right to abortion by stretching the right to privacy. When is it right for the justices to reach as far as they reached during the civil rights period?

Emily Bazelon: Yeah I mean this is such a great and the central question and I don't think there really is an obvious answer to it. Obviously there are decisions like Plessy which, you know, entrenched racial segregation, that we want gone. Like we don't want them to stick around forever, nobody does. And so nobody has an absolute theory that the Supreme Court should never reverse its previous work.

And once you introduce that possibility then you have a kind of sliding scale and again justices make value judgments about when they think that it's necessary or permissible. And there are judges who are very consistent about what they call a kind of theory of judicial modesty or humility where they want the courts to have just a lesser role in American life.

They're hesitant to overturn legislation because that's the work of the elected branches. They pay a lot of respect and deference to previous precedents. But honestly judges like that are few and far between. Mostly what you see is a kind of openness to being more activist in the sense of having more court importance or supremacy in American's lives. You see a sliding scale of openness to that based on what the goal is. I'm not even sure that all the time it's so important to be completely consistent about it but it's really hard to have a worked out theory that leads you to one right answer and I think sometimes conservatives claim that they have that with the theory of originalism of sticking to the original public meaning of the constitution. But when you actually look at how they're applying it case by case you see a lot of inconsistency there as well.

Abigail Disney: Well you know the constitution is interestingly like the Bible. It's a little self-contradictory and so open to interpretation that you come out-- I mean the second amendment is a perfect example of how you can walk away with different ideas of it. And so that's why I think I equate originalism with fundamentalism because it's not really possible to be actually consistent as a fundamentalist or as an originalist.

Emily Bazelon: Yeah I mean there are parts of the constitution that are really clear, right, like when it says each state shall choose two senators, there isn't a whole lot of ambiguity. But when you have-- but the second amendment you're absolutely right is completely open to interpretation You know maybe it's like missing a comma or has an extra comma that changes this meaning or the drafters just needed a better copy editor and phrases like equal protection and due process and even free speech or freedom of religion, these are very general kind of grand phrases that different justices read different meaning into.

And perhaps that was the framers intent all that all along perhaps the framers thought well we're creating this document and its meaning will change over time. They did not specify the methodology that they wanted judges to interpret the document with.

Abigail Disney: Which of course is why equating it with the Bible is really foolish.

Emily Bazelon: Or maybe not! The Bible doesn't have an instruction or methodology.

Abigail Disney: Right--but I've heard people argue that it does.

Emily Bazelon: Right right.

Abigail Disney: Emily, thank you so, so much it was fascinating, fun to talk to you.

Emily Bazelon: Oh, good. I'm glad I really enjoyed the conversation. Thanks so much for having me.

Abigail Disney: You can hear Emily Bazelon every week on Slate's Political Gabfest, the weekly podcast with John Dickerson of CBS and David Plotz of City Cast. And you can find Emily's 2019 best-selling book *Charged* about the outsize power of prosecutors in this country in bookstores everywhere.

And you can find her on Twitter @emilybazelon.

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