give them justice and understanding, in English, of what it is you have done. Is that your hope?

Judge BREYER. I certainly hope so.

Senator SIMPSON. It is mine, too, and I know you will, from my knowledge of you.

I thank you, Mr. Chairman, and I have further questions; I am just going to submit those in writing, if I may.

Thank you for your courtesies and your manner in conducting the hearing.

The CHAIRMAN. Thank you. He likes judges that are controversial, but that is easy for a man who never has known controversy to say that. If you had a little controversy, political controversy, you might not encourage him so much to do that.

Senator SIMPSON. It takes one to know one, my friend. You have been there.

[Prepared questions of Senator Simpson and Judge Breyer's responses follow:]

QUESTIONS FOR JUDGE BREYER

SUBMITTED BY SENATOR ALAN K. SIMPSON

JULY 14, 1994

1. I am asking this question at the request of Senator Warner.

A number of Senator Warner's constituents have called and written asking what are your views of "home schooling" and "private religious schools." This week you addressed some testimony to these issues. Senator Warner has asked me to give you the attached op-ed piece from the July 13 *Virginia Pilot* written by Michael Farris, who is the president and founder of the Virginia-based Home School Legal Defense Association, for you review.

Specifically, in the case of *New Life Baptist Church Academy* v. *Town of East Longmeadow*, the District Court had ruled that it was a violation of the First Amendment for the public school district to evaluate teachers and curriculum in the New Life Baptist Church Academy, a "private religious school."

You reversed the lower court's decision on September 7, 1989. This raises concerns with not only those whose children are home schooled or in private religious schools, but also for others who are committed to a strict interpretation of the First Amendment.

Judge Breyer, what assurances can Senator Warner give his constituents about your views on "private religious schools" and the protection afforded these institutions in the First Amendment?

And, religion aside, what protection does the Constitution offer to those parents who wish to teach their children at home?

2. What do you think of the efficacy of state medical malpractice and product liability tort laws in the following areas:

(a) compensating people who have been injured or killed by corporate or professional negligence;

(b) deterring the marketing of unsafe products and the practice of substandard medical care; and

(c) alerting state and federal health and safety agencies to information that enables them to perform their generalized duties?

3. What are your views on the preemption of state tort laws through a federal statute [1] that does not confer federal question jurisdiction over tort lawsuits?

In other words, do you think it is wise for Congress to pass a federal law to govern product liability or medical malpractice lawsuits that are brought in state courts under state common and statutory law?

[1] S. 687, which was recently defeated on the Senate Floor, would have preempted state product liability laws with a statute that would be interpreted by 30 different state court systems.

JUDGE BREYER'S RESPONSES

JULY 18, 1994.

Senator ALAN K. SIMPSON,
261 Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR SIMPSON: Thank you for your additional questions dated July 14, 1994. I am pleased to offer the following responses to your inquiry.

1. *Home Schooling.* Many years ago, in the cases of *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court made clear that the "liberty" guarantee of the due process clause of the Fourteenth Amendment ensures parents' right to "direct the upbringing and education of children under their control." 268 U.S. at 534–35. The Court reaffirmed the existence of that right in *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965). That basic guarantee of liberty protects parents who are not motivated by religious considerations as well as those who are. Thus it is well-established law that the Constitution offers protection independent of the Free Exercise Clause to parents in deciding how to educate their children.

At the same time, it is also well-established law that the state has a "compelling" interest in making certain that its children receive an adequate secular education. *See, e.g., Wisconsin* v. *Voder*, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of the State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."); *Meyer* v. *Nebraska*, 262 U.S. at 402 ("The power of the State of compel attendance at some school and to make reasonable regulations for all schools * * * is not questioned.")

In the case of *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 885 F.2d 940 (1st Cir. 1989), the First Circuit was required to engage in a delicate balance of those competing interests of parents and the state, and to ensure that both interests were respected. The state laws at issue in *New Life Baptist* provided that a local school commission must "approve" the quality of secular education (i.e., in nonreligious subjects) provided at private schools—religious and nonreligious alike—in order for students of those schools to comply with the state's compulsory school attendance laws. A unanimous panel, in a decision which I authored, upheld the proposed approval process after ensuring that the state's regulation of private secular education was "reasonable" and no more burdensome upon constitutional protections afforded to private religious schools than necessary to serve the state's interest.

Several of my other opinions have recognized the importance of accommodating religious beliefs and of guaranteeing parents' right to send their children to private schools. *See, e.g., Members of Jamestown School Committee* v. *Schmidt*, 699 F.2d 1, 13 (1st Cir.) (Breyer, J., concurring) (states have latitude to provide services such as bus transportation to children attending private religious schools so long as those services are provided equally to public school students), *cert. denied*, 464 U.S. 851 (1983); *see also Aman* v. *Handler*, 653 F.2d 41 (1st Cir. 1981) (public university officials may not deny official recognition to religious student organizations simply because they disagree with the organizations' views); *Alexander* v. *Trustees of Boston University*, 766 F.2d 630, 646 (1st Cir. 1985) (Breyer, J., dissenting) (states must tolerate deviations from regulations and statutes where doing so would further the accommodation of sincere religious beliefs); *Universidad Central de Bayamon* v. *NLRB*, 793 F.2d 383 (1st Cir. 1986) (en bano) (faculty hiring by church-operated universities should be exempt from the National Labor Relations Act).

I might add that the test our court applied in *New Life Baptist* might be viewed as more protective of the free exercise of religion than the test later adopted by the Supreme Court in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), and far closer to the test that Congress recently enacted into law in the Religious Freedom Restoration Act.

2. *State Medical Malpractice and Product Liability Tort Laws.* The efficacy and wisdom of state medical malpractice and product liability tort laws is a highly controversial issue currently the subject of extensive legislative debate at both the state and federal levels. It would be inappropriate for me to comment on essentially legislative judgments. As a judge, I would enforce any constitutional federal legislation enacted in the area.

3. *Preemption of State Tort Laws.* The wisdom of enactment of a federal law to govern state product liability or medical malpractice lawsuits is likewise a legislative determination that is currently the subject of extensive debate. As a judge, I would enforce any federal legislation enacted in the areas that is in accord with the Constitution.

Thank you for your inquiry. My best wishes.
Sincerely,

STEPHEN G. BREYER.

The CHAIRMAN. Senator Leahy.

Senator LEAHY [presiding]. Thank you, Mr. Chairman.

As we know, a vote has just started in the last few minutes, and so I will not have the time to do a number of the questions I had wanted.

Judge Breyer, you are the first nominee in the nearly 20 years I have been here that I have not been able to be here for every word of your testimony, and I apologize for that. Unfortunately, something that I had absolutely no control over, the foreign operations bill, was on the floor, and as we have in the last number of years, we have done both our authorizing and appropriating in the same bill. I am the manager of that bill, so I have been stuck there.

I had a lot of followup questions from your earlier responses. I was impressed with your answers, but I was also impressed earlier that on a number of my questions, very artfully, you did not go into a full answer. I understand some of your reasons, but I would like to follow up on a couple of those questions.

One answer in your discussion with Senator Simpson made me think of this question. You have talked of the ninth amendment. You have talked of unenumerated rights. You and I had a discussion of Justice Goldberg's decisions. But as I recall from my notes, after you noted that the ninth amendment protected unenumerated rights, as well as noting that a right to privacy is well-settled, you said that what these enumerated rights "are and how you find them is a big question." I would agree with that. You said you looked for a reference to liberty in the 14th amendment, and as I have read the transcript of your testimony in the evening, you have talked about the dignity of the person during the last couple days. Is that your way of articulating an unenumerated constitutional guarantee?

Judge BREYER. The ninth amendment, to Justice Goldberg, and I think to many others, makes clear that fact that certain rights are listed does not mean there are not others. Then the 14th amendment takes the word "liberty," and the question that you ask is, well, if there are others, how do we know what they are.

Senator LEAHY. How do you find them—where do you find them?

Judge BREYER. And what you have suggested is of course, you start with the text, and then you look back to history, and you look back to what the Framers thought. But so often, you cannot—what the Framers thought is that the Constitution should adapt, preserving certain basic values. So, what are those values? And we are back to where we started with a historic approach. We are back to where we started.

I think the word "dignity" is important. At the most basic level, the Preamble to the Constitution lists what the Framers were up to—establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.

Liberties are then listed, some, and underlying things like free speech and free religion, as I described or discussed when I talked about my own family, listening, is an idea, in my mind, of dignity.

[Response of Judge Breyer and the prepared statement of Senator Leahy follow:]

JUDGE BREYER'S RESPONSE TO SENATOR LEAHY'S QUESTION

LEADING CASES

In response to Senator Leahy's request that I identify Supreme Court cases of particular importance decided since I graduated from law school, I am providing the following list of decisions, the importance and wisdom of which are, in my judgment, widely accepted.

1. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). This case redeemed the promise of our democratic form of government by ensuring an equal vote for every citizen.

2. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). While the exact contours of the right against self-incrimination remain a subject of debate, *Miranda* established the basic proposition that the Fifth Amendment would prevent the most serious abuses of official power.

3. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). By reinvigorating the clear and present danger test in a case involving the Ku Klux Klan, this decision affirmed the fundamental principle that the First Amendment must protect even the speech we hate.

4. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), and *Craig* v. *Boren*, 429 U.S. 190 (1976). These cases established the critical principle that the Fourteenth Amendment's guarantees extend to gender discrimination.

5. *Mistretta* v. *United States*, 488 U.S. 714 (1989). This decision is important not so much for its specific subject matter (the Sentencing Commission) but more generally because it reintroduced needed flexibility into the constitutional separation-of-powers analysis, ensuring that Congress and the President can meet new challenges to effective governance posed by complex modern problems.

PREPARED STATEMENT OF SENATOR LEAHY

Mr. Chairman, I conclude my round of questioning with these observations: I want to commend my colleagues for their thoughtful participation in these most important proceedings and to commend Judge Breyer for the way he has conducted himself and his willingness to reveal something of himself and his thinking.

Quite frankly, I would have liked him to be even more forthcoming and specific in his responses, but I acknowledge that the appropriate line is difficult to draw and recognize that my frustration may reflect my own perspective as a Senator asking questions.

I have sensed through the course of these proceedings a disappointment among some that there has not been more controversy surrounding this nomination, that we have not had to endure a donnybrook or witness a wealth of political maneuvering. I suggest, to the contrary, that we should take pride in what is transpiring here: This is an occasion when all three branches of our Federal Government can be seen working together smoothly and efficiently.

I hope that the members of the public who have had an opportunity to join us over the last few days either in person or to witness these proceedings on television have taken something positive from them. I again commend President Clinton for having chosen a nominee who can bring people of diverse political views together and who has engendered such praise as an excellent choice.

Finally, if I might, I say to you, Judge Breyer, that after you are confirmed I hope that you will successfully resist the pressures to become cloistered away from the world. I think that your involvement with your family, demonstrated throughout these hearings, provides some protection for you. I doubt that your active wife and children are going to allow you to lose touch.

In your opening statement and your answers over these last three days you have indicated your intention always to remember the effects that your decisions will have on real people—people who may not be powerful or well-connected. You have demonstrated that you have not only mastered the complexities of the law but are the fulfillment of your parents' influences toward public service and to awareness of the impact your work will have on the lives of others.

So I urge you even while sitting on the High Court to be of the world. I do not suggest that you tailor your opinions to the winds of public opinion. Rather, I urge you to remember that you have learned about government and people. I call upon you to fulfill the promise you made to the American people as these proceedings began—to remember that the decisions you help to make will have an enormous effect upon the lives of many, many Americans and to do your utmost to see that