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Comment

Young, Talented, and Fired: The New Jersey Law Against Discrimination and the Right Decision in Bergen Commercial Bank v. Sisler

Chad A. Stewart*

In Bergen Commercial Bank v. Sisler,1 twenty-five year-old Michael Sisler was replaced by an older employee at Bergen Commercial Bank following a five-month employment period.2 Thereafter, Sisler brought an age discrimination suit under the New Jersey Law Against Discrimination (LAD).3 Breaking with prior decisions under the statute,4 the New Jersey Supreme Court held that the LAD permitted a person under forty to bring an age discrimination claim.5

Sisler questioned whether the protection cast by the LAD was broad enough to allow an individual under forty to bring an age discrimination claim.6 This inquiry is significant—if individuals under the age of forty can assert age discrimination claims under the New Jersey anti-age discrimination statute, they will be granted protection they have been unable to attain under other statutory7 and constitutional provisions.8 In short,

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1. 723 A.2d 944 (N.J. 1999).
2. See id. at 948.
3. See id.
4. See infra note 30 and accompanying text.
5. See Sisler, 723 A.2d at 953 (stating that the legislature must have concluded that younger individuals should also be entitled to bring claims under the LAD).
6. See id. at 955-57.
7. See infra note 13 and accompanying text.
8. See Gregory v. Ashcroft, 501 U.S. 452, 471 (1991) (stating that "[t]his court has said repeatedly that age is not a suspect classification under the
if states can legislate to allow younger individuals to bring age discrimination claims, the age restrictions imposed by the Age Discrimination in Employment Act will no longer limit protection from age discrimination to those over the age of forty.

This Comment seeks to establish that the Supreme Court of New Jersey interpreted the LAD correctly in permitting a twenty-five year-old to state a valid age discrimination claim, but that the court erred by not providing a more rigorous analysis. Part I provides context for the Sisler decision through an examination of relevant statutes, legislative history, and case law preceding the decision. Part II explains the Sisler holding and reasoning in detail. Part III criticizes the Sisler court for failing to support the plain meaning of the LAD when the opportunity was available. Part III further asserts that the Sisler court erred by insufficiently exploring possible inferences of legislative intent and by neglecting to analyze the preemption question. Finally, this Comment concludes that despite its weaknesses, the Sisler decision signals an opportunity for states to provide employment protection for individuals under the age of forty.

I. THE LAW PRIOR TO BERGEN COMMERCIAL BANK V. SISLER

Congress passed the Age Discrimination in Employment Act (ADEA) in 1967 to address arbitrary age discrimination suffered by older workers in the labor force. A survey of the

Equal Protection Clause.


10. See id. § 621. Congress's statement of findings and purpose for the ADEA is as follows:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce
legislative history of the statute expands upon this broad statement of purpose and states that the aim of the legislation is to promote the employment of older workers based on their ability.\textsuperscript{11}

A. THE AGE RANGE

Perhaps the most controversial element of this remedial legislation centered on the establishment of who the legislation was designed to protect. Based primarily on a report by the Secretary of Labor,\textsuperscript{12} Congress defined the protected class to include individuals between the ages of forty and sixty-five.\textsuperscript{13} The Secretary's extensive findings confirmed the need to protect older workers.\textsuperscript{14} According to the report, many establishments had declined to hire any workers who had reached the age of forty-five.\textsuperscript{15} The report further indicated that age was not a factor in calculating ability,\textsuperscript{16} that it had little to do with job performance,\textsuperscript{17} that older workers were often a benefit in and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Id.

\textsuperscript{11} See H.R. REP. NO. 90-805, at 1-2 (1967), reprinted in 1967 U.S.C.C.A.N. 2213, 2214 (indicating that "the purpose of [the ADEA is] to promote the employment of older workers based on their ability" and that "[t]he prohibitions in the [ADEA] apply to employers, employment agencies, and labor organizations").

\textsuperscript{12} See generally U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965) [hereinafter OLDER AMERICAN WORKER].

\textsuperscript{13} See 29 U.S.C. § 631(a)-(c)(1) (providing that individuals must be forty or older to bring a federal age discrimination claim).

\textsuperscript{14} See generally OLDER AMERICAN WORKER, supra note 12.

\textsuperscript{15} See id. at 5 (explaining that 20\% of the surveyed establishments indicated that during the previous year they had failed to hire any workers age 45 or over). But see id. at 14 ("A considerable number of employers reported an amenability to hiring older workers but claimed that few applied. Making applications may not be a popular method of seeking work, and discouraged older workers may not be sufficiently aggressive to use it.").

\textsuperscript{16} See id. at 81 (indicating that a survey of many studies reveals that age alone is a poor indicator of ability).

\textsuperscript{17} See id. at 86 (noting that in work requiring substantial physical exertion, productivity decreased markedly in advanced age groups, but that productivity remained nearly constant across age groups in less physically demanding activities). See generally BUREAU OF LABOR STAT., U.S. DEP'T OF LABOR, BULL. NO. 1223, COMPARATIVE JOB PERFORMANCE BY AGE (1957);
the workplace rather than a liability, and that contrary to conventional beliefs, older workers had quite healthy attitudes about their jobs. In addition to these factors, the Secretary emphasized the difficulties that older workers faced when attempting to find new employment following termination. One of the most problematic aspects of older workers' unemployment was that they typically remained unemployed for longer periods of time than workers in other age groups.

B. STATES MAY PASS ANTI-AGE DISCRIMINATION LEGISLATION

Another important provision of the ADEA concerns the relationship between federal and state legislation in age discrimination. Specifically, Congress authorized the states to


18. See OLDER AMERICAN WORKER, supra note 12, at 15. The report stated as follows:

Most of the employers named stability, dependability, and knowledge and experience as the main attributes of older workers that influenced their willingness to employ them. Other reasons cited were: less absenteeism; good work habits and attitudes; ability or skills; quality or quantity of work; pride in work; and consistent performance and adaptability.

Id.

19. See id. at 88 (indicating that studies do not support the contention that older workers have poor attitudes).

20. See id. at 89. Many factors outside the control of older workers lead to substantial difficulties in finding reemployment. See id. Among these difficulties are low levels of education, low skill levels, and inability to adjust to occupational, pay, or geographic changes. See id. But see SUPPLEMENTAL VIEWS OF REPRESENTATIVES THOMPSON OF NEW JERSEY, HOLLAND, DENT, O'HARA OF MICHIGAN, HAWKINS, GIBBONS, WILLIAM D. FORD OF MICHIGAN, HATHAWAY, MINK, SCHEUER, AND MEEDS ON H.R. 13054 (addressing the fact that arbitrary age discrimination is occurring continually in the airline industry, which stipulates that flight attendants must retire at 32). Also significant is the reasoning in the legislative history for not extending the age discrimination protection to these stewardesses—"it deserves mention again, that the only reason the committee bill does not specifically address this discrimination" is because the major purpose of the bill is to protect older workers. Id. at 6.

21. See OLDER AMERICAN WORKER, supra note 12, at 98. In 1964, when a monthly average of more than 1 million persons 45 and over were unemployed, their unemployment lasted an average of 19.4 weeks, compared with 11.0 weeks for those under 45. See id. But see id. at 99 (providing chart indicating that unemployment rates for individuals between the ages of 20 and 24 were more than twice as high as that for workers 65 and over).
draft legislation to protect workers from age discrimination,\textsuperscript{22} with the proviso that suits under the federal legislation would supersede any state suit.\textsuperscript{23} New Jersey's age amendment to the Law Against Discrimination (LAD)\textsuperscript{24} was one of twenty states that remained valid under this federal provision.\textsuperscript{25} At the time the LAD was passed, New Jersey was one of only four states that seemingly allowed younger individuals to bring claims based on age discrimination.\textsuperscript{26}

\textsuperscript{22} See 29 U.S.C. § 633(a) (1994) (expressing congressional desire for states to legislate in this area by requiring plaintiffs to explore state remedies before pursuing action under the ADEA).

\textsuperscript{23} See id. § 633(b). Two circuit courts have considered the contours of § 633(a) and concluded that the language does not permit federal courts to stay state court proceedings. See Murphy v. Uncle Ben's, Inc., 168 F.3d 734, 740 (5th Cir. 1999) ("We conclude that § 633(a) does not constitute express Congressional authorization for federal courts to enter injunctions staying state judicial proceedings involving parallel state law age discrimination claims."); Promisel v. First Am. Artificial Flowers, Inc., 943 F.2d 251, 256 (2d Cir. 1991) (concluding that a federal court is authorized to stay only state administrative proceedings involving claims of age discrimination, not state court suits under such statutes).

\textsuperscript{24} N.J. STAT. ANN. §§ 10:5-1 to -49 (West 1993 & Supp. 1999). Section 10:5-4 provides: "All persons shall have the opportunity to obtain employment... without discrimination because of... age.... This opportunity is recognized as and declared to be a civil right." Section 10:5-12(a) provides that it shall be an unlawful employment practice or discrimination "if an employer, because of... age... to discharge or require to retire, unless justified by lawful considerations other than age." However, section 10:5-12(a) contains a proviso stating that the section does not "bar an employer from refusing to accept for employment or to promote any person over 70 years of age." Finally, section 10:5-2.1 provides in relevant part: "Nothing contained in this act... shall be construed to require... the employment of any person under the age of 18, nor to prohibit the establishment and maintenance of bona fide occupational qualifications... ."


\textsuperscript{26} See OLDER AMERICAN WORKER, supra note 12, at 116 (setting forth the following states and corresponding age ranges: Colorado (between 18 and 60), Louisiana (under 50), New Jersey (21 and over), and Oregon (between 25 and 65)). At present, a number of states maintain anti-age discrimination laws that either contain no minimum age restrictions or that set the minimum age at 18. See COLO. REV. STAT. § 24-34-402 (1999) (any age); IOWA CODE ANN. § 216.6(1) (1994 & Supp. 1999) (any age); KAN. STAT. ANN. § 44-1112(a), 1113 (1993) (minimum age is 18); MICH. COMP. LAWS §§ 37.2102, 37.2103(a) (1985 & Supp. 1999) (any age); N.H. REV. STAT. ANN. § 354-A:7 (1995 & Supp. 1999) (any age). At the same time, however, other States continue to require
Until Bergen Commercial Bank v. Sisler,\textsuperscript{27} the New Jersey courts had never allowed an individual under the age of forty to state a claim based on age discrimination,\textsuperscript{28} despite the fact that the LAD does not contain a lower limit defining the protected class.\textsuperscript{29} In fact, such LAD suits were governed for the most part by the same procedures and substantive burdens imposed in suits brought under the ADEA.\textsuperscript{30}

that the age discrimination plaintiff be at least 40 years of age. \textit{See}, e.g., ALA. CODE § 25-1-21 (Supp. 1999); ARK. CODE ANN. § 21-3-202 (Michie 1996); GA. CODE ANN. § 34-1-2(a) (1996); IDAHO CODE § 67-5910(7) (1995); KY. REV. STAT. ANN. § 344.020(1)(b) (Michie 1997); MASS. GEN. LAws. ANN. ch. 151B, § 1(8) (West 1999).

27. 723 A.2d 944 (N.J. 1999).

28. The New Jersey Supreme Court had side-stepped the issue in \textit{Sprague v. Glassboro State College}, a case where a nontenured 26 year-old professor at a state college filed a verified complaint with the Division on Civil Rights alleging that the college and its president had denied him tenure because of his age. 391 A.2d 558, 559 (N.J. Super. Ct. App. Div. 1978) (per curiam). The field representative determined that tenure decisions were not made on the basis of age. \textit{See id.} at 560. Summarizing her findings, the field representative noted that “[t]he investigation revealed that the respondents grant tenure in the Administrative Studies Department either to individuals who have a doctorate or a comparable amount of experience in business.” \textit{Id.} Since the professor had neither a doctorate nor extensive business experience, the court was satisfied that the college denied him tenure not because of age discrimination, but simply “because he failed to meet the uniform standards of the college.” \textit{Id.} at 561.

29. Nowhere in the statute did the New Jersey Legislature define the term “age.” However, the word is defined in many commonly used dictionaries. \textit{See}, e.g., \textit{WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 40} (1986) (providing a number of definitions of the word “age”).

30. \textit{See}, e.g., \textit{Lawrence v. National Westminster Bank}, 98 F.3d 61, 65 (3d Cir. 1996) (“Age discrimination claims under the ADEA and LAD are governed by the same standards and allocation of burdens of proof.”); \textit{Maidenbaum v. Bally’s Park Place, Inc.}, 870 F. Supp. 1254, 1258 (D.N.J. 1994) (“Age discrimination claims under the LAD are governed by the same standards and burden of proof structures applicable under the ADEA.”), \textit{aff’d mem.}, 67 F.3d 291 (3d Cir. 1995); \textit{see also} Jon W. Green & Kyle M. Francis, \textit{Age Discrimination in Employment: A Plaintiff’s Perspective, in LITIGATION 1995, at} 227, 229 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5212, 1995) (noting that the standard of proof of age discrimination is generally the same under federal and state law). One major difference between federal and state enforcement, however, is that “[a]s a rule, the state courts have interpreted civil rights [statutes] less stringently than conservative federal courts.” \textit{Id.} Accordingly, the article concludes, it is more favorable to bring age discrimination claims in state courts. \textit{See id.}; \textit{cf.} \textit{Bitsko v. Main Pharmacy, Inc.}, 673 A.2d 825, 827 (N.J. Super. Ct. App. Div. 1996) (noting that in “an age-discrimination case involving unequal pay for equal work asserted under the LAD is governed by the ‘broader approach’ of Title VII”).
C. AGE DISCRIMINATION SUITS UNDER WASHINGTON, OREGON, AND ALASKA STATUTES: CONFLICTING CONCLUSIONS REGARDING THE PROTECTED CLASS?

In *Gross v. City of Lynnwood*, the Supreme Court of Washington decided a case involving a thirty-five year-old male who had been rejected for a position as a fire fighter on three separate occasions, despite strong performances on both written and oral examinations. The apparent reason for this rejection was that the applicant was ineligible for enrollment in the Law Enforcement Officers' and Firefighters' Retirement System (LEOFFRS). The provision that excluded him from enrolling in the plan required that applicants be under the age of thirty-five. Based on this rejection, the appellant filed suit alleging a violation of Washington's law against age discrimination.

Washington had two applicable statutory provisions prohibiting age discrimination in employment. The first provision stated that an employer may not refuse to hire any person because of the person's age. The second provision prohibited employers from discriminating against workers between the ages of forty and sixty-five in all employment decisions.

Acknowledging that the first provision prohibited age discrimination against younger workers, the court addressed whether the second one served as a limitation upon the total prohibition of age discrimination. Undertaking this inquiry, the court noted that its primary objective was to give effect to the legislative intent behind the statute, and that such intent should be determined by analyzing the statutory context as a whole. Using this axiom as its guide, the court turned to the well-known rule of statutory construction that a statute should

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31. 583 P.2d 1197 (Wash. 1978) (en banc).
32. See id. at 1198.
33. See id.
34. See id.
35. See id.
36. See id. at 1199 (citing WASH. REV. CODE § 49.60.180).
37. See id. (citing WASH. REV. CODE § 49.44.090).
38. See id. (noting that section 49.60.180 represents a “total prohibition against age discrimination”).
39. See id. (stating that “[a]ppellant has a cause of action against respondents unless the language of [section] 49.44.090 is construed as a limitation upon [section] 49.60.180”).
40. See id.
be interpreted to avoid rendering other provisions superfluous.\textsuperscript{41}

The court determined that giving full effect to the total prohibition against age discrimination contained in the first provision would render the language of the second provision—prohibiting discrimination against those between the ages of forty and sixty-five—mere surplusage.\textsuperscript{42} Such a result, the court reasoned, could not have been intended by the legislature.\textsuperscript{43}

As additional support for this determination, the court noted that the basic purpose of an age-discrimination statute is to protect older workers from forced retirement and other discrimination, not to protect younger workers.\textsuperscript{44} Moreover, reading the two applicable statutory provisions in accordance with one another, the court held that Washington's age discrimination statute only provided protection for persons ages forty to sixty-five.\textsuperscript{45}

In \textit{Ogden v. Bureau of Labor},\textsuperscript{46} the Supreme Court of Oregon considered whether a thirty year-old woman could bring an age discrimination claim under the state's age discrimination statute.\textsuperscript{47} The statute provided that it was unlawful for an employer to discriminate in employment on the basis of age if the individual was between the ages of eighteen and seventy.\textsuperscript{48} In \textit{Ogden}, the employer refused to hire a thirty year-old woman for a position at the employer's retirement home, in part because the employer felt that the applicant was too young.\textsuperscript{49} The employer maintained that because age was not the "sole factor" in her decision, the plaintiff could not bring a valid age discrimination claim.\textsuperscript{50} The court found this contention unten-
able and concluded that the plaintiff’s claim was legitimate because she fell within the statute’s explicit age range.

In Simpson v. Alaska State Commission for Human Rights, a federal district court permitted a sixty-five year-old plaintiff to bring an age discrimination claim that otherwise would have been precluded under the ADEA. Upon reaching the age of sixty-five, an employer allegedly terminated Simpson because of his age. Simpson brought suit under Alaska’s age discrimination statute. The statute, enacted two years prior to the ADEA, specifically prohibited age discrimination “in compensation or in a term, condition, or privilege of employment... when the reasonable demands of the position do not require distinction on the basis of age.” Based on the plain language of the statute, the legislative intent behind the statute, and its rejection of federal preemption, the Simpson

51. See id. at 191 (emphais added).
52. See id. (observing that attributing the literal meaning of the term “solely” to the age discrimination statute would limit the scope of the statute’s protection to cases where “the employer’s explicit or actual policy were to give preference to an older or a younger employee without regard to any other characteristic, qualification, or performance” and concluding that the statute should not be bound by such a “limited view of the law”).
54. See id. at 554.
55. See id. at 555.
56. See id. at 556.
57. The fact that the Alaska statute preceded the ADEA is significant. Although the Simpson court did not mention it, there is a presumption against implied repeals. See infra text accompanying note 71. Under this theory, Congress is presumed to be aware of the Alaska law, and no changes to it are presumed in the absence of explicit statement. See infra note 71 and accompanying text.
58. See Simpson, 423 F. Supp. at 554 (quoting ALASKA STAT. § 18.80.220(a)(1)).
59. See id. (contending that “[t]he statute unequivocally states that there shall be no discrimination based on age”).
60. See id. (noting that the legislature must have realized that the term “age” was open-ended because the statute’s declaration of purpose explicitly stated that the statute was not intended to supercede other state statutes concerning child labor, the age of majority or other age requirements).
61. The Simpson court’s discussion of preemption is particularly enlightening. See id. at 555 (“Preemption occurs when compliance with both federal and state regulations is physically impossible, the nature of the subject matter requires federal supremacy and uniformity, or Congress intended to displace
court held that the sixty-five year-old plaintiff was able to state a valid age discrimination claim.62

D. BASIC PRINCIPLES OF STATUTORY INTERPRETATION

A familiar rule of statutory construction holds that any analysis must begin with the text of the statute itself.63 If the text is clear and unambiguous, further inquiry is unnecessary and the statute should be implemented as written.64 In an effort to find the plain meaning of a statutory term, courts frequently consult popular dictionaries.65

(state legislation.) (citations omitted). The Simpson court reached two conclusions. First, the federal and state statutes worked in a complementary manner and it was possible to comply with both. See id. Stating that "conflicts in legislation should not be sought out where none exist[,]" the court found the case for preemption to be rather weak. Id. at 556. Second, the Alaska law preceded the ADEA and nothing in the ADEA suggested an intent to limit the reach of the Alaska statute. See id. Further, preemption in the realm of employment is particularly unlikely, given the states' broad authority to regulate in this area under their police powers. See id; see also Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 253 (1994) (noting that "[p]reemption of employment standards 'within the traditional police power of the State' should not be lightly inferred"). For additional discussion of preemption in relation to the ADEA, see generally Michael D. Moberly, A Better ADEA?: Using State Wage Payment Laws To Enhance Remedies for Age Discrimination, 32 TULSA L.J. 21 (1996) (stating that the ADEA established minimum standards and that states were left free to expand upon them).

62. See Simpson, 423 F. Supp. at 556. It is also worthy of note that since the Simpson and Ogden decisions, Congress has done nothing to indicate that it does not agree with the conclusions of those courts. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985) (noting that under the acquiescence rule, such congressional inaction "is at least some evidence of the reasonableness of that construction").

63. See, e.g., Essex Crane Rental Corp. v. Director, Div. on Civil Rights, 682 A.2d 750, 751-52 (N.J. Super. Court. App. Div. 1996) (stating that it is the court's duty "to apply the legislative intent as expressed in the statute's language, and . . . not to presume that the Legislature intended something other than what it expressed by its plain language").

64. See, e.g., Ardestani v. INS, 502 U.S. 129, 135-36 (1991) (noting that a strong presumption exists that a statute is to be applied as written except in infrequent circumstances where a contrary legislative intent is clearly expressed); Gangemi v. Berry, 134 A.2d 1, 6 (N.J. 1957) ("In the case of all written laws, it is the intent of the lawgiver that is to be enforced; and, in the absence of ambiguity calling for permissible extrinsic aids, this intent is to be found in the instrument itself.").

65. Both the United States Supreme Court and the New Jersey Supreme Court have consulted popular dictionaries for guidance in the absence of statutory definition. See, e.g., MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 226 (1994) (consulting Webster's Third International Dictionary to find the meaning of the term "to modify"); In re Adoption of Children by G.P.B., Jr., 736 A.2d 1277, 1283 (N.J. 1999) (using Webster's Third Interna-
If the text of the statute is found to be unclear, the courts attempt to discern the legislative intent in passing the statute.\textsuperscript{66} This task necessitates an inquiry into the statute’s legislative history, including floor debates, committee reports, and committee debates.\textsuperscript{67} Where such history is unavailable or unreliable, many extrinsic aids to statutory construction are used to help determine legislative intent. Among these aids are the following canons of statutory construction: \textit{expressio unius est exclusio alterius},\textsuperscript{68} the theory of the dog that did not bark,\textsuperscript{69} the

\begin{itemize}
\item \textit{tional Dictionary} to define a word not defined in the statute); Brooks v. Odom, 696 A.2d 619, 622 (N.J. 1997) (turning to Black’s Law Dictionary, Taber’s Cyclopedic Medical Dictionary, and Webster’s New Collegiate Dictionary for definitions of the words “permanent,” “loss,” “bodily,” and “function,” since no definitions were provided in the statute itself); State v. Mortimer, 641 A.2d 257, 260 (N.J. 1994) (employing a dictionary to define a word of Pakistani descent). \textit{But cf. Ardestani}, 502 U.S. at 135 (1991) (stating that “under” has many dictionary definitions and therefore its meaning must be drawn from the statutory context).
\item \textit{See William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation As Practical Reasoning, 42 STAN L. REV. 321, 340-43 (1990) (discussing the limits of relying on textualism alone).}
\item \textit{See William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 733 n.1 (2d ed. 1995).}
\item \textit{Expressio unius est exclusio alterius} means “the expression of one thing is the exclusion of another.” BLACK’S LAW DICTIONARY 581 (6th ed. 1990). For examples of case law applying the \textit{expressio unius} canon, see TVA v. Hill, 437 U.S. 153, 188 (1978) (holding that in the context Endangered Species Act, the \textit{expressio unius} canon must be invoked to exclude any additional exemptions not explicitly stated in the Act); Keeley v. Loomis Fargo & Co., 183 F.3d 257, 266-67 (3d Cir. 1999) (using \textit{expressio unius} to conclude that the New Jersey Legislature’s explicit exclusion of some things from overtime wages requirement precluded any other exceptions), cert. denied, 120 S. Ct. 983 (2000). \textit{But see State v. Dicarlo, 338 A.2d 809, 814 (N.J. 1975) (explaining that \textit{expressio unius} is subordinate to the higher principle of giving effect to, rather than defeating, legislative intent).}
\item Under this theory, nothing of importance in the statute is deemed to have changed if there is no discussion in the legislative history to support it. See Chisom v. Roemer, 501 U.S. 380, 395-96 (1991) (refusing to interpret the term “representatives” in a fashion so as to exclude judicial elections from coverage under a statute because if Congress had so intended, “at least some of the Members would have identified or mentioned it at some point”); Church of Scientology v. IRS, 484 U.S. 9, 17-18 (1987) (“We think ... by analogy to Sir Arthur Conan Doyle’s ‘dog that did not bark,’ that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not ... as readily accepted by the floor manager of the bill.”). \textit{But see} Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 (1980) (noting that “[i]n ascertaining the meaning of the statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.”).
\end{itemize}
rule to avoid absurd interpretations,\textsuperscript{70} the rule that implied repeals are not favored,\textsuperscript{71} the rejected proposal rule,\textsuperscript{72} and the rule that remedial legislation should be interpreted broadly.\textsuperscript{73}

In essence, these canons of construction allow a court to draw inferences about legislative intent based on the manner in which the statute was written.\textsuperscript{74}

II. **BERGEN COMMERCIAL BANK V. SISLER: TOO YOUNG TO BE A VP?**

Bergen Commercial Bank recruited Sisler in 1993 to operate its merchant and credit card programs.\textsuperscript{75} At that time, Sisler was employed by another bank and was not actively seeking employment.\textsuperscript{76} After numerous meetings with the upper management of Bergen, Sisler accepted the job.\textsuperscript{77} Prior to commencing his job at the bank, Sisler met with Tony Bruno, the bank’s chairman and co-founder.\textsuperscript{78} During the course of their conversation, Bruno asked Sisler his age, to which Sisler responded that he was twenty-five years old.\textsuperscript{79} According to Sisler, Bruno was shocked by this information and requested that Sisler not share his age with anyone else at the bank, because the combination of his youth, substantial responsibilities,

\textsuperscript{70} See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (noting that “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available”).

\textsuperscript{71} Under this rule, in the absence of a specific statement, no changes are presumed. See e.g., State v. Des Marets, 455 A.2d 1074, 1081 (N.J. 1983) (recognizing that implied repeals are not favored, but stipulating that this presumption can be overcome by a showing of “irreconcilable inconsistency” between the two pieces of legislation).

\textsuperscript{72} See, e.g., Bostwick v. United States, 521 F.2d 741, 743-44 (8th Cir. 1975) (noting that a statement in the majority report could not be accorded any weight because “[i]t is evident to us that the Congress, as a whole, rejected the viewpoint stated in the majority report of the Senate Finance Committee and intended the plain meaning of the amendment to have effect”).

\textsuperscript{73} See, e.g., Nieves v. Individualized Shirts, 961 F. Supp. 782, 796 (D.N.J. 1997) (explaining that because the New Jersey Law Against Discrimination is remedial social legislation, it is deserving of a liberal construction).

\textsuperscript{74} For a more complete discussion of statutory interpretation, see generally Eskridge & Frickey, supra note 66.


\textsuperscript{76} See Sisler, 723 A.2d at 947-48.

\textsuperscript{77} See id. at 948.

\textsuperscript{78} See id.

\textsuperscript{79} See id.
and high salary would be an embarrassment to the organization. Eight days after he started his new job, Bruno and the president of Bergen informed Sisler that they “didn’t think this was going to work” and encouraged Sisler to accept a lower-level position. Sisler refused to do so and, five months later, was terminated and replaced by a thirty-one year-old individual.

The trial court granted summary judgment for Bergen Bank concerning the age discrimination claim, finding that the legislature undoubtedly intended to limit the protected class to individuals over the age of forty. The Appellate Division rejected this interpretation of the LAD and held that the statute affords broad protection, regardless of the worker’s age. Further, the court stated that two issues must be taken into account in the construction of the term “age”: first, whether there was any implication that such protection should be limited to a particular age; and second, whether there was any implication that the protection from age discrimination was only to be afforded to older workers.

The Supreme Court of New Jersey began its inquiry into the scope of the LAD by noting that the New Jersey courts had traditionally construed the statute in a manner consistent with adjudication under analogous federal statutory provisions. The Appellate Division, however, had rejected this method of interpretation in Sisler. The Appellate Division reasoned that significant differences in the pertinent language of the ADEA and the LAD necessitated an independent analysis of the scope of the LAD. In particular, the lack of any age range in the LAD stood in stark contrast to the firm age range established

80. See id.
81. Id.
82. See id.
83. See id.
85. See id.
86. See Sisler, 723 A.2d at 949. For example, in Burke v. Township of Franklin, the Appellate Division held that a 39 year-old individual could not bring a valid age discrimination claim because he did not fall within the protected class as defined by the ADEA. 619 A.2d 643, 646 (N.J. Super. Ct. App. Div. 1993). The court stated that because he was only 39 years of age, “plaintiff did not fall within the protected class under the ADEA, and no material issue of fact exists here under the applicable federal law.” Id. at 647.
87. See Sisler, 723 A.2d at 950.
by the ADEA.88 Agreeing with the Appellate Division, the high court of New Jersey concluded that a court must conduct an independent analysis when a LAD provision differs substantively from a similar federal statutory scheme.89

Based on its analysis of the age protection afforded under the LAD, the Supreme Court of New Jersey held that the statute allowed individuals under forty to bring age discrimination claims.90 In reaching this conclusion, the Sisler court relied on analyses in decisions from the high courts in Washington and Oregon that interpreted state anti-age discrimination provisions, scant legislative history, and a few basic principles of statutory interpretation.91

The Sisler court began its analysis by looking at the text of the statute itself, noting that the task of statutory interpretation must always begin with the statute's plain language—the clearest expression of statutory meaning.92 The court stated that if the meaning of a statute is clear, the judiciary is obligated to implement the statute as written, without using any "judicial interpretation, rules of construction, or extrinsic matters."93

At the same time, however, the court noted that if different interpretations of a statute are possible, the plain language of the statute is not clear and the courts may apply principles of statutory construction.94 Two factors led the Sisler court to conclude that varying interpretations of the statute were possible: first, the different interpretations of the word "age" by the trial court and the Appellate Division;95 and second, the different conclusions reached by the courts of Washington and Oregon in cases involving interpretation of age discrimination statutes.96

First, the court noted that the trial court interpreted the word "age" in narrow fashion, to apply exclusively to older

88. See id.
89. See id.
90. See id. at 958.
91. See id. at 949-53.
92. See id. at 950 (noting that "[t]he first step in any statutory analysis is to examine the statute's plain language as the clearest indication of meaning" (citations omitted)).
93. Id. (citations omitted).
94. See id. at 950-51.
95. See id. at 951.
96. See id.
workers. This interpretation contrasted with the Appellate Division's broad interpretation of the word "age," which it found to extend protection to workers of any age who might face discrimination based on that characteristic. The Sisler court concluded that these "divergent interpretations militate[d] against a finding that the meaning of the term 'age' [was] facially obvious or self-evident."

Similarly, the court acknowledged that the high courts of Washington and Oregon had reached different conclusions regarding whether younger workers are entitled to protection under statutory age discrimination provisions. Discussing Gross v. Lynnwood, the Sisler court noted that two statutes influenced the Gross court's decision. While the first statute failed to mention any age range within which protection from age discrimination would be afforded, the second statute limited the age discrimination protection to individuals between the ages of forty and sixty-five. Because of the limitations imposed by the second statute, which was construed in pari materia with the first, the Gross court concluded that only older workers were protected from age discrimination. A contrary interpretation, the Gross court noted, would lead to the undesirable result of rendering the language of the second section's age range superfluous.

97. See id.
98. See id.
99. Id.
100. See id.
101. 583 P.2d 1197, 1198 (Wash. 1978); see also supra notes 31-45 and accompanying text (explaining the facts and the Gross court's conclusion that protections afforded by the anti-age discrimination provisions were limited to individuals between the ages of 40 and 65).
102. See Sisler, 723 A.2d at 951.
103. See id. Statutes or document provisions that are in pari materia are those that relate to the same person or subject. See BLACK'S LAW DICTIONARY 1115 (6th ed. 1990). For examples of case law discussing the doctrine of in pari materia, see In re Return of Weapons to J.W.D., 693 A.2d 92, 96 (N.J. 1997) (stating that "[s]tatutes in pari materia are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent" (quoting State v. Green, 303 A.2d 312, 316 (N.J. 1973))); Kimmelman v. Henkels & McCoy, Inc., 527 A.2d 1368, 1371 (N.J. 1987) (determining that "[i]n discerning [legislative] intent we consider not only the particular statute in question, but also the entire legislative scheme of which it is a part").
104. See Sisler, 723 A.2d at 951; see also supra note 45 and accompanying text.
105. See supra text accompanying note 42.
Mindful of the *Gross* court's holding, the *Sisler* court turned its attention to the Supreme Court of Oregon's interpretation of the anti-age discrimination statute in *Ogden v. Bureau of Labor*.\(^{106}\) The Oregon statute stated explicitly that protection against age discrimination was limited to individuals between eighteen and seventy years of age.\(^{107}\) The combination of this explicit age range and the lack of additional statutory ambiguity allowed the *Ogden* court to part with the *Gross* decision. The *Ogden* court held that based on the plain language of the statute, a thirty year-old plaintiff could state a valid age discrimination claim.\(^ {108}\)

Following its separate consideration of these two cases, the *Sisler* court attempted to reconcile the divergent outcomes.\(^ {109}\) The court attributed the conflicting outcomes to the fact that the word "age" was not subject to a clear and unambiguous interpretation.\(^ {110}\) Accordingly, the court concluded that the lack of any clear definition of the term supported Bergen Bank's position that the New Jersey legislature's intent in prohibiting age discrimination was not clear on its face.\(^ {111}\) Therefore, the court turned to other statutory interpretation considerations.

After concluding that a textual analysis would not resolve the meaning of the LAD's age provision, the *Sisler* court next considered the legislative intent behind the addition of the anti-age discrimination provision.\(^ {112}\) This task, however, was rendered significantly more difficult by the fact that no statement of purpose accompanied the 1962 amendment to the LAD.\(^ {113}\)

This void left the *Sisler* court only two tools with which to divine the legislative intent behind the age provision: (1) the

\(^{106}\) 699 P.2d 189 (Or. 1985).
\(^{107}\) See supra note 48 and accompanying text.
\(^{108}\) See *Ogden*, 699 P.2d at 194.
\(^{109}\) See *Sisler*, 723 A.2d at 952.
\(^{110}\) See id. at 951 (stating that "the courts of Washington and Oregon have disagreed on whether younger workers are protected by state anti-age-discrimination provisions that, like New Jersey's, do not facially limit the protected class to older workers"); see also id. at 952 (explaining "whereas the Washington court felt constrained by policy considerations to limit its age discrimination provisions to 'mature workers,' the Oregon court, reading its statute plainly, concluded that 'age' should not be so narrowly construed, citing the broad legislative purpose behind the discrimination laws").
\(^{111}\) See id. (noting that "[t]hose decisions lend support to Bergen Bank's position in this case that the legislative intent in proscribing age discrimination is not apparent on the statute's face").
\(^{112}\) See id.
\(^{113}\) See id.
canon mandating that the court avoid construing a statute in a manner that would render other sections superfluous, and (2) two studies examining age discrimination that pre-dated the addition of the age provision and likely influenced the legislature.\textsuperscript{114}

Noting the rule of statutory construction that courts should avoid construing a statute in a manner that would render any word of a statute inoperative, superfluous or meaningless, the \textit{Sisler} court considered two other sections of the LAD.\textsuperscript{115} First, the court noted that section 10:5-2.1 stated that nothing in the LAD would require an employer to hire an applicant under the age of eighteen.\textsuperscript{116} Second, the court discussed section 10:3-1 which prohibited appointing officers from discriminating on the basis of age in hiring state employees where the applicant was forty years of age or older.\textsuperscript{117} The \textit{Sisler} court concluded that these two provisions of the LAD would be rendered superfluous if the protected class of individuals included only those individuals over the age of forty.\textsuperscript{118}

Following this analysis, the \textit{Sisler} court turned its attention to two studies concerning the difficulties that older workers encounter in the workplace. Both studies were completed before the passage of the 1962 anti-age discrimination amendment to the LAD.\textsuperscript{119} In short, these studies concluded that workers over the age of forty-five were most severely affected by age discrimination.\textsuperscript{120}

The \textit{Sisler} court acknowledged that the legislature may or may not have considered these publications when amending the LAD to add the anti-age discrimination provision.\textsuperscript{121} To the extent that it did consider these studies, however, the court held that the age range of forty-five to sixty-five recommended by the Commission on Aging was not adopted into the anti-age discrimination provision.\textsuperscript{122} The court supported this conclu-

\begin{enumerate}
\item See id.
\item See id.; see also supra note 43 and accompanying text (providing additional examples of this rule's application).
\item See Sisler, 723 A.2d at 952 (quoting § 10:5-2.1).
\item See id. (quoting § 10:3-1).
\item See id.
\item See id. at 952-53.
\item See id. at 953.
\item See id.
\item See id.; see also supra note 72 and accompanying text (discussing the rejected proposal rule).
\end{enumerate}
sion by noting the absence of such age range language in the statutory text.123

Based on the foregoing analysis, the Supreme Court of New Jersey held that the LAD's prohibition of age discrimination was broad enough to sustain a claim by a twenty-five year-old individual.124 This conclusion was driven largely by the fact that while the ADEA expressly limits the protected class to individuals of age forty or above, the LAD contains no such limitation, thereby precluding parallel interpretation.125 As further support for its decision, the court noted that indications of legislative intent and the broad remedial purpose of anti-age discrimination legislation warranted a liberal construction of the statute.126

III. FINDING PLAIN MEANING, FURTHERING THE INQUIRY INTO LEGISLATIVE INTENT, AND REJECTING PREEMPTION

Prior to Bergen Commercial Bank v. Sisler, the New Jersey courts consistently interpreted the LAD to limit age discrimination claims to individuals above the age of forty.127 The analysis accompanying these decisions was conclusory and based largely upon an unexplained incorporation of the ADEA's age restrictions. Further, the conclusions concerning the age range limitation were reached without serious consideration of principles of statutory interpretation.

In contrast, the Sisler court reached the correct decision in holding that the LAD is sufficiently broad to allow individuals under the age of forty to bring age discrimination claims. In doing so, however, the court failed to engage in a coherent process of statutory interpretation. The Sisler court's reasoning opens itself to criticism on three fronts. First, the court engaged in almost no actual textual analysis128 and missed an opportunity to support the statute as written. Second, although there are bright points in the Sisler court's analysis of legislative intent, the court failed to draw many reasonable inferences

123. See Sisler, 723 A.2d at 953.
124. See id. at 957.
125. See id.
126. See id.
127. See supra notes 28-30 and accompanying text.
128. See supra notes 92-111 and accompanying text.
which would have solidified its analysis. Third, the court declined to analyze whether the LAD anti-age discrimination provision was preempted by the ADEA. This failure is especially troublesome, given the fact that until Sisler, the New Jersey courts had always interpreted the federal statute’s age range to limit the state law.

A. PHANTOM TEXTUAL ANALYSIS

It is a common rule of statutory construction that the courts must strive to give effect to the legislative intent behind a statute. Further, the best way to discover such intent is through an examination of the statute’s plain language, which is the clearest indication of meaning. Despite this commonly accepted approach, the Sisler court failed to examine the plain meaning of the New Jersey anti-age discrimination statute.

In reaching its conclusion that the text of the LAD was not clear and unambiguous, the Sisler court relied on two factors. First, the court examined the trial and appellate courts’ textual conclusions and found that because the two courts disagreed about the scope of the word “age,” the text was not clear and unambiguous. Second, the court emphasized that the Washington and Oregon courts had reached conflicting decisions regarding whether or not their state statutes could support age discrimination claims by individuals under forty. Both of these inquiries are inherently flawed.

1. Procedural Posture: Conflict in the Lower Courts

First, neither the trial court nor the appellate court based their decision on the plain meaning of the word “age” in the LAD. Rather, the decisions were reached based on the courts’ independent inquiries into the legislative intent behind the age amendment. As noted previously in this Comment, the

129. See infra Part III.B.
130. See infra Part III.C.
131. See supra note 30 and accompanying text.
132. See supra note 92 and accompanying text.
133. See supra note 92 and accompanying text (indicating that courts should attempt to discern the plain meaning of statutory language as the clearest indication of legislative intent).
134. See supra notes 92-99 and accompanying text.
135. See supra text accompanying notes 100-11.
136. See supra note 29 (explaining that the LAD provides no definition of the word “age.”).
legislative intent behind the amendment was extremely diffi-
cult to discern because the legislative history was comprised
exclusively of two studies that the legislature may or may not
have consulted.\textsuperscript{137} Despite the lack of supporting evidence, the
trial judge concluded that the Legislature must have consulted
the two studies that preceded the age amendment—the "re-
ports clearly, unequivocally, without any doubt focused on a
protected class that was the result of age; that is, persons above
40 years of age, and higher who were being deprived of em-
ployment."\textsuperscript{138} This statement illustrates that the trial judge
made no independent inquiry into whether the word "age" had
a clear and unambiguous meaning. On the contrary, her find-
ings were conclusory\textsuperscript{139} and based heavily on studies that the
legislature may not have consulted.\textsuperscript{140}

Although the Appellate Division's reasoning was more per-
suasive, it also failed to analyze the meaning of the word
"age."\textsuperscript{141} This fact is demonstrated by the manner in which the
Appellate Division framed its inquiry in the case. The court
noted that in its "construction" of the word "age," it had to de-
termine whether there was any "implication" that the legisla-
ture intended to limit protection from age discrimination to a
particular age group or to older workers in general.\textsuperscript{142}

The use of the words "construction" and "implication" indi-
cate that the Appellate Division passed over any actual consid-
eration of the word "age," and whether it had clear meaning as
written.\textsuperscript{143} "Construction" is defined as "the discovery and ap-
plication of the meaning and intention or of a statement of fact

\textsuperscript{137} As noted above, no significant legislative history accompanied the
1962 age amendment. \textit{See supra} notes 119-22 and accompanying text (dis-
cussing two studies which \textit{may} have influenced the legislature in its contem-
plation of adding an age provision to the LAD).

\textsuperscript{138} Bergen Commercial Bank v. Sisler, 704 A.2d 1017, 1021 (N.J. Super.

\textsuperscript{139} How the trial judge concluded that 40 was the appropriate lower limit
is unclear. Both the studies she consulted indicate that age discrimination
begins to have an effect at the age of 45. \textit{See supra} notes 119-22 and accom-
pnnying text; \textit{see also infra} text accompanying notes 200-03.

\textsuperscript{140} The trial judge may also be criticized for failing to consider other por-
tions of the same statute. \textit{See supra} note 103 and accompanying text (noting
that context must be considered in statutory interpretation).

\textsuperscript{141} \textit{See Sisler}, 704 A.2d at 1022.

\textsuperscript{142} \textit{See id.}

\textsuperscript{143} \textit{See supra} note 92 and accompanying text (stating that, in statutory
interpretation, consideration must first be given to the actual words of the
statute).
to a particular state of affairs." To discern the meaning of the word "implication," resort must be had to the verb from which this noun is derived, "imply." Two definitions of the verb "to imply" are relevant in this context. First, the verb can mean "to indicate or call for recognition of as existent, present, or related not by express statement but by logical inference or association or necessary consequence." The second definition reads "to convey or communicate not by direct forthright statement but by allusion or reference likely to lead to natural inference." In short, if the Appellate Division had considered whether the word "age" had a clear meaning, it would have been unnecessary to resort to "construction" or "implication," unless it first found that "age" did not have a clear meaning. Accordingly, it is reasonable to conclude that the lower court removed itself from the text of the statute itself before considering any unambiguous meaning of the word "age."

The foregoing analysis demonstrates that neither the trial court nor the Appellate Division made any true inquiry into the meaning of the term "age" as employed by the New Jersey legislature. On the contrary, both courts neglected such a consideration and analyzed only whether other indicators of legislative intent could shed light on the word's meaning.

Accordingly, the New Jersey Supreme Court's conclusion in Sisler that the two lower courts' "divergent interpretations militate against a finding that the meaning of the term 'age' is facially obvious or self-evident" is simply incorrect.

2. Expanding the Inquiry to Other Jurisdictions: Conflicting Interpretations of "Age"?

Because the Sisler court found the statute's text ambiguous, it was correct to attempt to determine the legislative intent behind the LAD. The court, however, mischaracterized the

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144. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 489 (1986); see also supra note 65 and accompanying text (noting that this dictionary, among others, is frequently consulted to discern the meaning of statutory terms). Although other definitions exist, this one is particularly applicable, given the example that follows it. Namely, Webster's gives the following example in its definition of construction: "the construction put on a statute by a lawyer." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 489 (1986).


146. Id. (emphasis added).

147. See supra notes 86-99 and accompanying text.

issues in *Gross* and *Ogden*, and therefore erred in its interpretation of their conclusions. Both the *Gross* and *Ogden* courts found their anti-age discrimination statutes to be clear and unambiguous as written.\(^{149}\) Therefore, the *Sisler* court's conclusion that "the courts of Washington and Oregon have disagreed on whether younger workers are protected by state anti-age-discrimination provisions that, like New Jersey's, do not facially limit the protected class to older workers,"\(^{150}\) is baseless and inexplicable.

In *Gross*, the issue was not whether the statute as written would support an age discrimination claim by a younger worker. On the contrary, the *Gross* court made it explicitly clear that the anti-age discrimination statute would support a claim by a younger worker, because it failed to state an age range.\(^{151}\) The issue was whether the total prohibition of age discrimination contained in section 49.60.180 was limited by section 49.44.090.\(^{152}\) Finding that the latter provision did limit the application of the total prohibition of age discrimination, the court rejected the contention that individuals under the age of forty could bring age discrimination claims.\(^{153}\) Unlike Washington, however, New Jersey has no corresponding statute that might limit a total prohibition of age discrimination. Since there is no limiting statute in New Jersey, the reasoning in *Gross* would seemingly support the contention that the LAD represents a total prohibition on age discrimination.

In similar fashion, the *Sisler* court failed to recognize the true question presented to the Supreme Court of Oregon in *Ogden*. According to *Sisler*, the issue addressed in *Ogden* was whether or not the term "age" could be narrowly construed so as to exclude younger workers from protection.\(^{154}\) This question, however, was not the issue faced in *Ogden*. In *Ogden*, the court stated that "[t]he only issue of interpretation raised in the petition for review is whether the statute requires the commissioner to determine that age was the 'sole factor' in considering applicants whose ages fall in the statutory range of 18 to 70

\(^{149}\) See supra notes 38, 52 and accompanying text.
\(^{150}\) *Sisler*, 723 A.2d at 951.
\(^{151}\) See *Gross* v. City of Lynwood, 583 P.2d 1197, 1199 (Wash. 1978) (en banc) (citing WASH. REV. CODE § 49.60.180).
\(^{152}\) See id.
\(^{153}\) See *id.* at 1200.
\(^{154}\) See *Sisler*, 723 A.2d at 951-52.
years.¹⁵⁵ These words make it clear that the Ogden court never considered excluding younger workers from the protected class, so long as they were at least eighteen years of age.¹⁵⁶ In fact, the Ogden court did not construe the word “age” at all, because the statute itself defined the protected class and allowed the court to implement the instrument as written.¹⁵⁷

The Sisler court is also subject to criticism for its failure to discuss Simpson v. Alaska State Commission for Human Rights,¹⁵⁸ in which the United States District Court for the District of Alaska considered an anti-age discrimination statute almost identical to the one in Sisler.¹⁵⁹ In Simpson, the court acknowledged that based on the language of the statute, no age limitations were acceptable.¹⁶⁰ The only question was whether any legislative intent could be uncovered which would limit the statute’s protection to a particular age group. The district court answered the question in the negative and the Ninth Circuit affirmed this decision.¹⁶¹ Thus, according to the Simpson court, the word “age” could be applied as written to prohibit all age-based discrimination. Given the similarity of the statutes at issue in the two cases, the Sisler court should have used the Simpson decision to support a decision based on the clear meaning of the word “age.”

3. A More Reasonable Approach Discerning Whether “Age” Is Subject to a Clear and Unambiguous Meaning

Based on the preceding discussion of reasoning adopted by the trial court and the Appellate Division as well as an analysis of the issues and holdings in Gross and Ogden, it is clear that the Sisler court provided no support for its conclusion that

¹⁵⁶. See id.; see also supra note 48 and accompanying text.
¹⁵⁷. A substantial body of case law supports applying the statute’s plain meaning when possible. See, e.g., supra note 92 and accompanying text.
¹⁵⁸. 423 F. Supp. 552 (D. Alaska 1976) (adjudicating under a statute similar to the anti-age discrimination statute in Sisler), aff’d, 608 F.2d 1171 (9th Cir. 1979).
¹⁵⁹. See id. at 553-54 (providing that “[i]t is unlawful for an employer ... to discriminate against [a person] in compensation or in a term, condition, or privilege or employment because of ... age ...” (quoting ALASKA STAT. § 18.80.220(a)(1))). Simpson, a 65 year-old individual, brought suit under this statute claiming that his employer terminated him because of his age. See id. at 553.
¹⁶⁰. See id. at 554.
¹⁶¹. See id. at 556.
“age” was not subject to a clear and unambiguous meaning.\textsuperscript{162} This fact is especially troublesome given the Sisler court’s acknowledgment that statutory analysis must always begin with the text of the statute itself.\textsuperscript{163} The Sisler court’s failure to conduct its own independent analysis is confounding when one considers that a method it had used in the past was readily at its disposal. In prior cases, the New Jersey Supreme Court had consulted dictionaries in discerning whether undefined statutory terms could be implemented based on their plain meaning.\textsuperscript{164}

Consultation with Webster’s Third New International Dictionary in this case would have led the Sisler court to conclude that the word “age” by itself cannot reasonably be limited to any particular age group.\textsuperscript{165} A number of relevant definitions are worthy of consideration. Of the seven relevant definitions that are provided, all but one provide clear support for the proposition that “age” is broad enough to allow younger individuals to be included within the protected class. These definitions include the following: (1) “the length of time during which a being or thing has lived or existed: the length of life or existence from birth or beginning to the time spoken of or referred to;” (2) “the complete duration of the life or existence of a being or thing . . . .”, (3) “any one of the periods or stages of life;” (4) “the time of life at which one becomes naturally or conventionally qualified or disqualified for something;” (5) “a measure of the development, capacity, condition, or quality of an individual or of one of his traits or parts that tends to alter with age, expressed as the chronological age at which such state is mean or average;” and (6) “the period that is contemporary with a person’s lifetime.”\textsuperscript{166}

The first definition above is clearly age range neutral. It fails to qualify the phrases “length of time” and “length of life or existence,” which require no interpretation to conclude that such length can be of short or long duration.\textsuperscript{167} Similarly, the second definition does not limit itself to people of an advanced

\begin{enumerate}
\item \textsuperscript{162} See supra Part III.A.1.
\item \textsuperscript{163} See supra notes 92-93 and accompanying text.
\item \textsuperscript{164} See supra note 65 and accompanying text (providing examples of such cases).
\item \textsuperscript{165} Webster’s Third New International Dictionary 40 (1986).
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id.
\end{enumerate}
This conclusion follows from the fact that "the complete duration of life or existence" might be many years or just a few minutes. In addition, no elaborate discussion is required to conclude that the third definition—"any one of the periods or stages of life"—is not limited to any particular age. The fourth definition also fails to exclude younger workers from the protected class. People become "naturally qualified or disqualified" to do things at many different stages in life. For example, a young adult becomes qualified to serve in the armed forces at age eighteen, but is disqualified from access to the juvenile courts at that same age. Likewise, a young adult is not qualified to receive Social Security benefits, whereas a sixty-five year-old individual is so qualified. Neither does the fifth definition suggest that "age" refers only to older workers because many "traits" tend to alter with age, such as height, shoe size, and depth of voice. Finally, the sixth definition can be dismissed for the same reasons as the second—"the period contemporary with a person's lifetime" can refer to either a short or a long period of time.

The preceding definitions justify the conclusion that the term "age," without more, is clear, unambiguous and capable of being applied as written, unless a contrary definition suggests otherwise. In fact, another definition is available, one that cuts in the other direction and demands serious consideration. Webster's provides the following alternative definition of the term: "an advanced stage of life: the latter part of life... the quality or state of being old." Although at first blush this definition appears to force the conclusion that "age" alone is ambiguous, more exacting scrutiny reveals that this definition can apply only in certain contexts.

Two examples that follow the definition help illustrate this point. The first example, "the feebleness of age," requires no lengthy consideration to conclude that it could only apply to an older individual. Similarly, the second definition, "age cannot
wither her"176 clearly limits the possible meaning of the word aged to older individuals. These two examples have one thing in common: their context lends them the meaning they desire. Without such context, the term "age" cannot be limited to older individuals.

The preceding examples indicate that unless the term "age" is used in a very specific context, it is unreasonable to limit its application to older workers. Does the LAD impose such limitations? This question must clearly be answered in the negative. Section 10:5-4 provides, "[a]ll persons shall have the opportunity to obtain employment, . . . without discrimination because of . . . age."177 The statute provides no specific context and therefore demands the conclusion that "age" refers to all workers, regardless of what stage of life they presently occupy.178 Accordingly, the LAD is clear and unambiguous and can be applied as plainly written.

B. IN SUPPORT OF THE LAD’S PLAIN LANGUAGE: USING EXTRINSIC AIDS TO STATUTORY CONSTRUCTION TO UNCOVER LEGISLATIVE INTENT

It would be unfair and misleading to criticize the Sisler court without acknowledging some positive points in its analysis. Under the rule to avoid surplusage, the legislature is presumed to have employed only those words it intended to have meaning and effect.179 Using this rule, the Sisler court noted that sections of the LAD that provided specific age limitations in certain situations would be rendered superfluous if the statute as a whole was interpreted not to represent a total ban on age discrimination.180

The court’s use of the expressio unius est exclusio alterius canon to broaden the statute’s application was also insightful. At the same time, however, the court should have applied the rule more aggressively to support the plain meaning of the LAD. The Sisler court provided only two examples of excep-

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176. Id.
178. This fact distinguishes the statute in Gross, where the application of the anti-age discrimination statute was limited by another section of the same statute. See supra text accompanying notes 36-45.
179. See supra text accompanying note 42.
180. See supra notes 115-18 and accompanying text; see also supra note 24 and accompanying text (providing the actual language of the two relevant sections of the LAD).
tions to the absolute prohibition against age discrimination contained in the LAD.  

Specifically, the court noted that section 10:3-1 allowed the state government to make age-based decisions when the job applicant was under the age of forty. This example lends support to the idea that the legislature understood how to create exceptions to the prohibition of all age discrimination. At the same time, however, it is only one of two examples offered by the court.

There are many other exceptions to the absolute prohibition against age discrimination contained in section 10:5-4 that the Sisler court left untouched. For example, the statute allows employers to refuse to employ and advance persons over the age of seventy, to require the retirement of high-ranking executives who are entitled to receive retirement benefits, to establish legitimate occupational qualifications which require the attainment of a reasonable minimum age, to refuse to employ individuals under the age of eighteen, and to discriminate on the basis of competence. Given the availability of all these exceptions, if the court was going to exploit the expressio unius canon at all, it would have been more persuasive to provide more examples.

Although expressio unius is only an aid in determining legislative intent and not a rule of law, three factors support an aggressive application of the canon in this situation. First, the decisions in Gross and Ogden, along with independent analysis, support the conclusion that the term "age" is unambiguous. Thus, there should be no concerns that the canon will

182. See id.
183. See supra notes 68, 72 and accompanying text (providing examples of expressio unius and the rejected proposal rule).
184. See supra note 24 and accompanying text (quoting relevant portions of this section of the statute).
186. See id. § 10:5-2.1.
187. See id.
188. See id.
189. See id.
190. See State v. Dicarlo, 338 A.2d 809, 814 (N.J. 1975) (arguing that expressio unius should be employed with caution and should not be used to overcome clearly expressed congressional intent).
191. See supra notes 31-45 and accompanying text.
192. See supra notes 46-52.
193. See supra Part III.A.
be employed to defeat, rather than give effect to, legislative in-
tent.194

Second, the LAD is remedial legislation and therefore
should be accorded as broad an application as possible.195
Based on this oft-applied rule of statutory construction,
younger individuals must be included in the protected class
unless the statute explicitly excludes them. The many excep-
tions to the LAD's prohibition of discrimination, none of which
mentions individuals under forty, lend further support to the
contention that protection from age discrimination should be
extended to younger individuals.196 The legislature thus un-
derstood the implications of its actions and limited the applica-
tion of the statute where it deemed necessary.

Third, and most persuasive, is the fact that the legislature
allowed for specific age-based exceptions.197 Nothing in the act
requires employers to hire individuals under the age of eight-
teen, nor prohibits the establishment of other reasonable age
requirements for apprenticeships.198 Any assertion that the
legislature crafted the exceptions in such fashion, but still in-
tended to limit the protected age class to those above forty, ex-
ceeds the bounds of reason. If employers were allowed to dis-
criminate on the basis of age against individuals under the age
of forty, an exception for individuals under eighteen would be
unnecessary. Such an interpretation would be absurd, and ac-
cordingly, must be rejected.199

The Sisler court's use of the rejected proposal rule200 in
considering the two studies that pre-dated the age amendment
to the LAD, also deserves mention.201 The court correctly con-
cluded that to the extent the legislature considered the studies,
they rejected the recommendations therein contained.202 Both
studies suggested that discrimination in employment becomes

194. See Dicarlo, 338 A.2d at 814.
195. See supra note 73 and accompanying text (noting cases construing
statutes with remedial purposes and affording them liberal interpretation).
196. See supra notes 185-89 and accompanying text.
198. See id. § 10:5-2.1.
(stating that absurd results should be rejected where a more reasonable inter-
pretation consistent with legislative intent can be reached).
200. See supra note 72 and accompanying text (discussing rejected proposal
rule and providing case law illustrations).
201. See supra text accompanying notes 119-22 (discussing studies).
202. See supra text accompanying notes 119-22.
a serious problem for workers when they attain the age forty-five.203 Because the reports provided outside age parameters which the legislature could have included, but did not, one must conclude that the legislature rejected such limitations.204

Although this conclusion is helpful, it fails to reach a deeper issue that Sisler left unresolved. If both studies on age discrimination in employment indicated that such discrimination begins around the age of forty-five, why did the New Jersey courts, for years, limit the protected class to individuals of age forty or older?205 Because there is no apparent correlation between the ages, there is no sound reason for the court to conclude that the legislature was influenced by the studies, unless some outside consideration can validate the inference.

It is possible that the New Jersey legislature relied on the ADEA's explicit age range when it imposed the lower age limit.206 This contention must be rejected, however, when one considers that the ADEA did not exist at the time of the amendment.207 Therefore, the ADEA could not have influenced the state legislature, unless it anticipated the federal legislation, consulted studies it knew Congress was considering, analyzed such studies, and intended to mirror the action it believed Congress would take. This inquiry is not only highly abstract and speculative, it is absurd.208 The primary literature that influenced Congress's decision to limit the protected class to individuals between the ages of forty and sixty-five was the report of the Secretary of Labor, which was published three years after the age amendment to the LAD.209 Moreover, the figures upon which the Secretary of Labor relied date back only to 1964.210 Therefore, it is impossible that the New Jersey legislature was influenced by any action at the federal level. It could

203. See supra text accompanying notes 119-22.
204. See supra note 24 and accompanying text (quoting N.J. STAT. ANN. § 10:5-4). Of course, this argument assumes that the legislature did, in fact, consult the studies.
205. See supra note 30 and accompanying text.
207. See supra notes 10, 13 and accompanying text (discussing applicable sections of the ADEA).
208. See supra note 70 and accompanying text (noting that absurd interpretations should be rejected).
209. See supra notes 12, 15-21 and accompanying text (discussing findings that were published in the 1965 report of the Secretary of Labor).
210. See supra note 21 and accompanying text (discussing 1964 length of unemployment rates for individuals over the age of 45).
not have intended that the LAD's protected class parallel that of the ADEA.

C. THE PREEMPTION ISSUE: DID THE ADEA PREEMPT MORE EXPANSIVE STATE LEGISLATION?

Given that the ADEA could not have influenced the New Jersey legislature's age amendment in 1962, the next question is whether the ADEA preempted more expansive state anti-age discrimination laws. This inquiry must focus on three considerations: the text of the ADEA, the legislative history accompanying the federal legislation, and Congress's failure to act following the Simpson and Ogden decisions. In Simpson, the United States District Court for the District of Alaska noted that federal preemption can occur in three ways.\(^{211}\) Having established this test, the Simpson court then quickly rejected any contention that the ADEA preempted state regulation in this area.\(^{212}\)

1. Conflict or Harmony?

The same conclusions that the Simpson court reached in rejecting the preemption argument can be used to validate Sisler. First, the age amendment to the LAD\(^{213}\) does not conflict with the substantive provisions of the ADEA—every individual afforded protection under the ADEA is also protected under the LAD. The state law simply expands upon the protection afforded by the federal statute.\(^{214}\) New Jersey employers can comply with both provisions by not discriminating on the basis

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\(^{211}\) See supra note 61 and accompanying text. First, preemption can occur when federal and state statutes conflict in such a way that compliance with both is impossible. See Simpson v. Alaska State Comm'n for Human Rights, 423 F. Supp. 553, 555 (D. Alaska 1976), aff'd, 608 F.2d 1171 (9th Cir. 1979). Second, it occurs where "the nature of the subject matter requires federal supremacy and uniformity." Id. Third, a federal statute preempts state legislation where "Congress intended to displace state legislation." Id.

\(^{212}\) See Simpson, 423 F. Supp. at 555-56 (noting first that the state statute was complimentary and not conflicting; second, that there was no congressional intent to preempt in this area; and third, that the states have traditionally had broad powers to legislate in the area of employment).

\(^{213}\) See supra note 24 and accompanying text (providing text of the LAD age amendment).

\(^{214}\) Nothing in the LAD changes the protections afforded under the ADEA. The state legislation expands on the ADEA's 40-65 age range to allow more individuals to bring age discrimination claims. See supra note 24 and accompanying text.
of age. The New Jersey law would be preempted only if it re-
duced the protection afforded under the federal statute.215

2. Traditional Area of State Legislation

States traditionally have regulated widely in the area of
employment law, and therefore, federal preemption "should not
be lightly inferred."216 Although it is true that expansive state
laws regulating employment have been preempted on occasion,
invalidation occurs only when state legislation frustrates the
goal Congress intended to achieve via the federal regulation.217
No such concern is implicated, however, in the case of the LAD.
The lone purpose of the ADEA was to promote the employment
of older workers based on their ability.218 The LAD retains all
of the substantive rights afforded to the protected class under
the ADEA.219 Thus, it does nothing to frustrate the purpose of
the federal legislation.

3. Congressional Intent To Preempt

An examination of the text of the ADEA and its legislative
history makes clear that Congress did not intend to create an
area of exclusive federal regulation. On the contrary, the text
of the ADEA expresses a desire for states to legislate in this
area, and for such state laws to have priority over the com-
 mencement of federal actions under the ADEA. Specifically,
§ 633(a) provides that, "[n]othing in this chapter shall affect the
jurisdiction of any agency of any State performing like func-
tions with regard to discriminatory employment practices on
account of age."220 Further, § 633(b) specifies that "[i]n the case
of an alleged unlawful practice occurring in a State which has a
law prohibiting discrimination in employment because of
age ... no suit may be brought under [the ADEA] before the
expiration of sixty days after proceedings have been com-
 menced under the state law."221 Most importantly, nothing
within the text of the ADEA restricts the ability of the states to
enact more expansive anti-age discrimination laws. Since the

215. See supra note 61 and accompanying text.
217. See supra note 61 and accompanying text.
219. The LAD picks up where the ADEA leaves off to prohibit all age-based
discrimination. See supra note 24 and accompanying text.
221. Id. § 633(b).
text of a statute is the primary indicator of legislative intent, one must presume that Congress did not intend to preempt state legislation.

Moreover, the legislative history accompanying the ADEA only tends to support the text of the Act itself. Four factors pertaining to this legislative history bear on legislative intent and are worthy of mention. First, at the time Congress considered the ADEA, lawmakers discussed the state anti-age discrimination laws that were currently in effect, but expressed no desire to preempt state laws that defined the protected class in a more liberal manner. Congress was clearly aware that some state statutes defined the protected class in such fashion. Specifically, Congress supported its decision to limit the lower age range to forty by stating that such age “is also the lower age limit found in most State statutes bearing on this subject.” By using the word “most” rather than “all,” Congress indicated that it was aware of some more liberal state statutes. At the time the ADEA was enacted, at least five states had age discrimination laws that defined the protected class more broadly than the subsequently enacted ADEA. Applying the theory of “the dog that did not bark,” one must conclude that Congress did not intend to preempt more expansive state laws. Instead, this evidence supports the idea that Congress intended that the ADEA provide minimum standards below which state laws could not fall.

Second, to the extent that state anti-age discrimination laws were discussed in the legislative history accompanying the ADEA, such discussion centered on whether the state laws were providing sufficient relief. More specifically, the legislative history makes it clear that Congress supported state legislation, but questioned whether it was having any substantial effect. This fact makes it very difficult to conclude that

223. See id.
225. See supra note 26 and accompanying text.
226. See supra note 69 and accompanying text (explaining this theory and giving case examples of its application).
227. See generally Moberly, supra note 61.
Congress intended to restrict the ability of states to legislate in more expansive fashion.

Third, the text of § 633(b) reveals that Congress did consider some state provisions that may have been inconsistent with the federal law. Section 633(b) of the statute provides, "[i]f any requirement for the commencement of such proceeding is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts . . . the proceeding shall be deemed to have been commenced for the purposes of [the ADEA]." This statement indicates that Congress did consider state procedures that affected enforcement under the ADEA and acted where it deemed it necessary to do so. Accordingly, under the expressio unius canon of statutory construction, one should not assume that Congress intended to displace any other portions of more liberal state legislation.

Finally, Congress was well aware that, by defining the protected class in the way it did, it was excluding airline stewardesses from age discrimination relief. The legislative history accompanying the bill addressed this concern and explained that although Congress wanted to protect airline flight attendants from arbitrary age discrimination, it felt that doing so would detract from the overall purpose of the bill—protecting older workers. Accordingly, Congress understood that some individuals under forty faced age discrimination, but decided not to act. The combination of this recognition, the explicit textual grant of authority to the states to legislate in this area, and Congress's clear ability to nullify state procedures where it deemed necessary, make it reasonable to conclude that Congress intended to leave states free to define the protected class in a more liberal fashion.

4. Sitting on Their Hands: Congressional Silence Following Simpson and Ogden

In addition to the preceding analysis of the ADEA's text and the legislative intent behind the Act, congressional silence

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231. See supra note 68 and accompanying text (explaining the expressio unius canon).
232. See supra note 20 and accompanying text.
233. See supra note 20 and accompanying text.
234. See 29 U.S.C. § 633(a)-(b) (granting states the power to legislate against discriminatory age practices).
235. See id. § 633(b).
following the *Simpson* and *Ogden* decisions is significant. In these cases, the Ninth Circuit and the Supreme Court of Oregon allowed age discrimination claims that would have been summarily dismissed under the ADEA. More specifically, the *Simpson* court validated an Alaska statute that allowed individuals of any age to bring age discrimination claims. Similarly, in *Ogden*, the court applied an Oregon statute that protected individuals between the ages of eighteen and seventy from age discrimination. Congress has had ample time since these decisions to amend the ADEA in a manner so as to preclude such expansive state legislation. This failure to act provides evidence of the reasonableness of the conclusions reached in *Simpson* and *Ogden* and lends further support to the *Sisler* decision.

**CONCLUSION**

In *Bergen Commercial Bank v. Sisler*, the New Jersey Supreme Court determined that the age provision in the New Jersey Law Against Discrimination was broad enough to support an age discrimination claim by a twenty-five year-old individual. Although the *Sisler* court reached the correct conclusion, it missed an opportunity to provide a strong thread of analysis for New Jersey lower courts and other state courts that will look to the decision in the future. In short, had the *Sisler* court more thoroughly researched and analyzed the issue, it would have provided other states with a wealth of ammunition to pass and support age discrimination protections which begin where the ADEA ends.

Despite its weaknesses, the *Sisler* decision represents a call for both judicial and legislative activism at the state level. *Sisler* provides a model for the courts in Iowa, Kansas, Michigan, and New Hampshire—whose anti-age discrimination statutes contain no minimum age limits—to interpret these statutes broadly to support claims by younger individuals. Such a construction does nothing to offend the goals of the

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238. See *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 137 (1985) (reasoning that congressional inaction in the face of a well-known judicial interpretation of a statute provides strong evidence of the reasonableness of that interpretation).
239. See *supra* note 26 and accompanying text.
ADEA; in fact, a liberal interpretation only furthers the ADEA's purpose of promoting individuals based on ability alone. In addition, the legislatures in other states should amend their anti-age discrimination statutes by removing their minimum age provisions.²⁴⁰ Following Sisler, state legislatures can take such action knowing that nothing in the ADEA prevents them from doing so.

²⁴⁰ See supra note 26 and accompanying text.