

# THE TERMINOLOGY WARS: THE DAIRY PRIDE ACT AND ITS POTENTIAL IMPINGEMENT ON INNOVATION

REBECCA L. RACITI\*

## I. INTRODUCTION

Innovation is defined as “the process of transforming a discovery (i.e. idea, invention) into a good(s) or service(s) that consumers/customers are willing to purchase.”<sup>1</sup> It is considered key to economic growth.<sup>2</sup> In fact, economists estimate that half of the American Gross Domestic Product (GDP) is associated with increases in innovation.<sup>3</sup> While the goal of the DAIRY PRIDE Act is to restrict the misbranding of plant-based products to avoid consumer deception and confusion, the large-scale and long-term impact of this legislation could be devastating, particularly to the future of innovation. This note suggests that terminology sequestration by the dairy industry may limit competition and stifle product innovation by increasing the cost of market entry for those wishing to push the boundaries of their product category.

This note seeks to analyze the DAIRY PRIDE Act and the potential impacts this proposed legislation will have on the current marketplace and on the future of product innovation in the food industry. Part II discusses the history of the dairy and plant-based industries leading up to the introduction of the Act. Part III provides an analysis of the impact the DAIRY PRIDE Act would have on the food industry, particularly on product innovation. Finally, Part IV addresses alternative suggestions.

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\* *Juris Doctor Candidate*, 2021, The Ohio State University Michael E. Moritz College of Law

<sup>1</sup> Raquel Pinho Ferreira Guiné et al., *New Foods, New Consumers: Innovation in Food Product Development*, 12 *CURRENT NUTRITION & FOOD SCI.* 175, 175 (2016).

<sup>2</sup> See *infra* note 96 and accompanying text.

<sup>3</sup> See *infra* note 95 and accompanying text.

## II. HISTORICAL ANALYSIS

### A. *The Decline of the Dairy Industry and Booming of the Plant-Based Industry*

People have consumed animal-derived milk products for thousands of years.<sup>4</sup> However, this multibillion-dollar industry has been declining steadily. In 2018, the Dairy Farmers of America, a marketing cooperative that represents roughly thirty percent of the national milk-derived product market, reported a net decline of \$1.1 billion in sales from 2017 to 2018.<sup>5</sup> This decline is not recent; dairy sales have been declining for decades. The United States Department of Agriculture's (USDA) Economic Research Service recently reported that the average milk consumption in the United States has steadily declined from 1975 to 2018.<sup>6</sup>

Although the Dairy Farmers of America attributed their recent billion-dollar loss to lower milk prices,<sup>7</sup> others, namely proponents of the DAIRY PRIDE Act, have attributed this decline to generational differences in milk consumption. In a 2013 report about milk intake frequency, the USDA indicated that “trends showing decreases in per

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<sup>4</sup> See Daniel Fernandez, *The Surprisingly Intolerant History of Milk*, SMITHSONIANMAG.COM (May 11, 2018), <https://www.smithsonianmag.com/history/surprisingly-intolerant-history-milk-180969056/>.

<sup>5</sup> Michael Bartiromo, *Milk Sales Fell \$1.1 Billion in 2018, Says Report from Dairy Farmers of America*, FOX NEWS (Mar. 29, 2019), <https://www.foxnews.com/food-drink/milk-sales-fell-1-1-billion-in-2018-says-report-from-dairy-farmers-of-america>; Brenna Houck, *America's Obsessions with Oat Milk is Hurting the Dairy Industry*, EATER (Mar. 26, 2019, 5:46 PM), <https://www.eater.com/2019/3/26/18282831/milk-sales-fall-2018-plant-based-alternatives>; *DFA Reports 2018 Financial Results: Strategic Investment Growth Continues to Strengthen the Cooperative*, DAIRY FARMERS OF AMERICA (Mar. 20, 2019), <https://www.dairyherd.com/sites/default/files/inline-files/DFA-2018%20Financial%20Release-FINAL.pdf> [hereinafter *DFA Reports*].

<sup>6</sup> According to the United States Department of Agriculture, the average American in 2018 consumed over 100 pounds less milk than the average American in 1975. This decline is most significant in the past ten years. See *Dairy Data*, U.S. DEP'T AGRIC. ECON. RES. DIV., <https://www.ers.usda.gov/data-products/dairy-data/> (follow “Dairy Products: Per Capita Consumption, United States (Annual)” hyperlink) (last visited Feb. 2, 2020); see also, Hayden Stewart et al., *Why Are Americans Consuming Less Fluid Milk? A Look at Generational Differences in Intake Frequency*, U.S. DEP'T AGRIC. (May 2013), [https://www.ers.usda.gov/webdocs/publications/45073/37650\\_err149\\_summary.pdf?v=0](https://www.ers.usda.gov/webdocs/publications/45073/37650_err149_summary.pdf?v=0) (“Since 1970 alone, per capital fluid milk consumption has fallen from 0.96 cup-equivalents to about 0.61 cup-equivalents per day.”).

<sup>7</sup> See *DFA Reports*, *supra* note 5.

capita consumption since the 1970s mainly reflect changes in consumption frequency.”<sup>8</sup>

While big dairy companies have been losing both profits and consumers, another group of companies has been experiencing growth. Companies offering plant-based products, mostly those producing and selling plant-based alternatives to dairy and meat products, have enjoyed substantial growth in the last decade. According to a report by the Good Food Institute and the Plant Based Foods Association, sales of plant-based product increased by 31.3% between April 2017 and April 2019, reaching a total of \$4.5 billion.<sup>9</sup> The plant-based milk category in particular has been exploding.<sup>10</sup> In the past year, Americans spent \$1.9 billion on plant-based milks alone,<sup>11</sup> making it not only the most popular plant-based food category in the United States,<sup>12</sup> but also the “fast[est] growing segment in newer food product development” across the globe.<sup>13</sup>

Much has influenced the popularity and growth of the plant-based industry as well as contributed to the decline of dairy consumption. A new generation of consumers has opted into an alternative lifestyle.

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<sup>8</sup> Stewart et al., *supra* note 6 (discussing the generational differences in milk consumption between Americans born before the 1930s, in the early 1960s, and in the early 1980s); *see also*, Elizabeth Sloan, *Generational Demands, Differences, and Diversity*, INST. FOOD TECH. (July 1, 2017), <https://www.ift.org/news-and-publications/food-technology-magazine/issues/2017/july/features/consumer-demographic-eating-preferences-and-patterns> (“Millennials are driving consumption of . . . nondairy milks.”).

<sup>9</sup> Janet Forgiveve, *Plant-Based Food Sales Continue to Grow by Double Digits, Fueled by Shift in Grocery Store Placement*, FORBES (July 16, 2019, 9:00 AM), <https://www.forbes.com/sites/janetforgiveve/2019/07/16/plant-based-food-sales-pick-up-the-pace-as-product-placement-shifts/#29bd69024f75>.

<sup>10</sup> Anthony Laudato, *Food Fight: Milk and their Plant-Based Alternatives*, CBS NEWS (Sept. 9, 2019, 9:08 AM), <https://www.cbsnews.com/news/milk-and-the-rise-of-oatly-and-other-plant-based-milk-alternatives>; *see also*, Gabriela John Swamy, *A Closer Look at Plant-Based Milk Alternatives*, INST. FOOD. TECH., <https://www.ift.org/news-and-publications/blog/2019/december/dairy-alternatives> (last visited Jan. 8, 2020) (“According to Allied Market Research, the global dairy alternatives industry was estimated to be worth \$13.02 billion in 2018 and is projected to reach \$35.80 billion by 2026.”).

<sup>11</sup> Forgiveve, *supra* note 9.

<sup>12</sup> *Id.*

<sup>13</sup> Swati Sethi et al., *Plant-Based Milk Alternatives an Emerging Segment of Functional Beverages: A Review*, 53 J. FOOD SCI. TECH. 3408, 3408 (2016), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5069255/pdf/13197\\_2016\\_Article\\_2328.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5069255/pdf/13197_2016_Article_2328.pdf).

The combination of globalization and social media<sup>14</sup> has exposed Millennials and Generation Z to a variety of new foods from diverse origins, encouraging them to try fare that past generations were neither exposed to nor willing to try,<sup>15</sup> notably original and replacement type plant-based products. Perhaps one of the most noteworthy reasons for the increase in consumption of plant-based products and the change in the way people eat is a greater concern for environmental and ethical consequences of consuming animal products.<sup>16</sup> In fact, the impact of

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<sup>14</sup> See Sean Fleming, *Ever Ordered a Vegan Meal? You Will Soon. This Is Why*, WORLD ECON. FORUM (Nov. 1, 2018), <https://www.weforum.org/agenda/2018/11/the-vegan-economy-is-booming-and-big-food-wants-a-slice-of-it/> (discussing that the promotion of campaigns such as Veganuary and the World Vegan Month through social media has increased consumers' interests in, and consumption of, a plant-based diet); see also Marissa Higgins, *This is the Most Popular Diet on Social Media*, GREEN MATTERS, <https://www.greenmatters.com/food/2018/08/29/1C1oKe/vegan-popular-diet-social-media> (last visited Oct. 23, 2019) (discussing that according to a team of researchers from Brandwatch, the vegan diet is the most popular diet on social media); see also *Social Media and the Rise of the Vegan*, U. of SUNDERLAND (June 28, 2018), <https://www.sunderland.ac.uk/more/news/story/social-media-and-the-rise-of-the-vegan-607> (“[S]ocial media is playing a critical role in the vegan revolution and the changing eating habits of a widening demographic”); see also Olivia Petter, *The Surprising Reason why Veganism is Now Mainstream*, INDEPENDENT (Apr. 10, 2018), <https://www.independent.co.uk/life-style/food-and-drink/veganism-rise-uk-why-instagram-mainstream-plant-based-diet-vegans-popularity-a8296426.html> (“A key part of what makes vegan content so stimulating is the growing community of social media influencers advocating the lifestyle as part of their brand”); see also, Katie Pevreall, *How Digital Media Has Transformed the Vegan Movement*, LIVEKINDLY (Jan. 9, 2018), <https://www.livekindly.co/digital-media-vegan-movement/> (discussing that the growth of social media has increased consumer knowledge on social issues and consumer expectation of brands in the food industry).

<sup>15</sup> Michelle Maynard, *The Food World's Next Big Question: What Does Generation Z Want to Eat?*, FORBES (June 6, 2019, 11:44 AM), <https://www.forbes.com/sites/michelinemaynard/2019/06/06/the-food-worlds-next-big-question-what-does-generation-z-want-to-eat/#2c3117ed2684>.

<sup>16</sup> See Christopher Wlach, *Docket No. FDA-2018-N-3522, Use of the Names of Dairy Foods in the Labeling of Plant-Based Products*, N.Y.C. BAR, [https://s3.amazonaws.com/documents.nycbar.org/files/2018453-Labeling\\_PlantBased\\_Products.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2018453-Labeling_PlantBased_Products.pdf) (discussing the reasons why Americans choose to consume plant-based milk over dairy milk, which include concerns about “the welfare of cows and heifers on dairy farms,” “the effect of dairy on the environment,” and moral convictions that consuming dairy products is “unjust for humans to exploit non-human animals”); see also Brian Kateman, *Non-Dairy Milk Alternatives are Experiencing a ‘Holy Cow!’ Moment*, FORBES (Aug. 19, 2019, 12:15 PM), <https://www.forbes.com/sites/briankateman/2019/08/19/non-dairy-milk-alternatives-are-experiencing-a-holy-cow-moment/#3f65468c4c44> (“Documentaries like *Eating Animals* and news media are making people more and

animal agriculture raises a number of sustainability concerns.<sup>17</sup> This concern has contributed to a dramatic increase in both the number of vegans and non-vegans who are choosing to incorporate plant-based products into their diets.<sup>18</sup> Others are compelled to seek alternatives to dairy milk because of a lactose intolerance or an allergy to cow's milk.<sup>19</sup>

Regardless of the reason why Americans choose to consume innovative non-dairy products rather than traditional dairy products, being able to find a potentially healthier and sustainable alternative to a familiar food is comforting and reassuring. Shannon Campagna, a spokesperson for the Plant-Based Association, indicated that “qualifiers such as ‘non-dairy,’ ‘dairy-free,’ and/or ‘alternative’ appropriately communicate that such products are simply a plant-based version of a dairy product and do not contain cow’s milk.”<sup>20</sup>

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more aware that the idyllic image of peaceful dairy cows living happy lives on wide-open, rolling pastures is seldom the reality.”).

<sup>17</sup> Kateman, *supra* note 16 (“[M]eat and dairy together use 83% of the world’s farmland and produce 60% of agriculture’s greenhouse gas emissions while supplying only 18% of calories and 37% of protein consumed by humans.”); Jonah Engel Bromwich & Sanam Yar, *The Fake Meat War*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/style/plant-based-meat-law.html%20--%3E%20add%20this%20next%20to%20familiar%20argument> (“Livestock are responsible for, roughly, 14.5 percent of the world’s greenhouse gas emissions each year, and cows, used for both meat and dairy, are responsible for the most livestock emissions.”); see also Jemima Webber, *This is Why Going Vegan is Better for the Environment*, LIVEKINDLY (Nov. 1, 2019), <https://www.livekindly.co/this-is-why-a-vegan-diet-is-better-for-the-environment/>. In a recent statement, the United Nations Environment Programme (UNEP) noted that “[o]ur use of animals as food-production technology has brought us to the verge of catastrophe.” UNEP further noted that “[t]he greenhouse gas footprint of animal agriculture rivals that of every car, truck, bus, ship, airplane, and rocket ship combined.” *Id.*; see also, *New Study Confirms Veggie Diets are more Sustainable than Non-Veggie Diets*, DOWN TO EARTH (May 18, 2018, 7:43 AM), <https://www.downtoearth.org/articles/2018-04/12051/new-study-confirms-veggie-diets-are-more-sustainable-non-veggie-diets> (discussing that a recent study conducted by the French Environment and Energy Agency (ADEME) found that vegetarian and vegan diets produced 49.6% fewer greenhouse gas emission, needed 26.9% less energy for production, and had a 41.5% smaller environmental footprint compared to other diets).

<sup>18</sup> Janet Forgive, *The Growing Acceptance of Veganism*, FORBES (Nov. 2, 2018, 1:58 PM), <https://www.forbes.com/sites/janetforgive/2018/11/02/picturing-a-kindler-gentler-world-vegan-month/#5385f0e72f2b> (discussing that the number of vegans in the United States rose by 600% merely between 2014 and 2017).

<sup>19</sup> Swamy, *supra* note 10.

<sup>20</sup> Lauren Sipple, *What’s in a Name?: The Use of Dairy Product Names in Labeling of Plant-Based Alternatives*, SCI. MEETS FOOD (Dec. 13, 2018), <http://sciencemeetsfood.org/whats-name-use-dairy-product-names-labeling-plant-based-alternatives/>.

Imagine taking those qualifiers away. What are the consequences of consumers not recognizing a product as an alternative to an existing product because of how it is labeled?

### B. *Legal Background*

Under current labeling regulations, the Federal Drug Administration (FDA) codifies the standard of identity for milk in 21 C.F.R. § 131 as “the lacteal secretion . . . obtained by the complete milking of one or more healthy cows.”<sup>21</sup> In the case of many standards of identity for dairy products, the FDA requires that foods, such as cheese or yogurt, contain dairy ingredients.<sup>22</sup> These standards of identity serve to protect consumers against the “intentional substitution of ingredients” through mislabeled products.<sup>23</sup>

Despite these regulations, the FDA’s enforcement of these provisions has been non-existent. Grocery store shelves across the nation are filled with non-dairy product alternatives made from nuts, plants, seeds, and algae that are labeled as “milk,” “yogurt,” or “cheese.” The DAIRY PRIDE Act’s objective is to put an end to such usage.

The DAIRY PRIDE Act—shorthand for Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act—was first introduced and sponsored by Wisconsin Senator Tammy Baldwin (D-WI) in January 2017.<sup>24</sup> This bipartisan bill seeks to amend 21 C.F.R. § 343 to require that foods that are inaccurately claiming to contain dairy ingredients—such as almond *milk* or coconut *yogurt*—“be considered ‘misbranded’ and subject to enforcement.”<sup>25</sup> Thus, this bill would prompt the FDA

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<sup>21</sup> 21 C.F.R. § 131.110 (2015).

<sup>22</sup> Sipple, *supra* note 20.

<sup>23</sup> FDA: *Foods Must Contain What Label Says*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/consumers/consumer-updates/fda-foods-must-contain-what-label-says> (Feb. 4, 2013); *see also*, 21 C.F.R. § 131.110(e) (2015) (“Under the provisions of section 403(c) of the Federal Food, Drug, and Cosmetic Act, a food shall be deemed to be misbranded if it is an imitation of another food unless its label bears, in type of uniform size and prominence, the word “imitation” and, immediately thereafter, the name of the food imitated.”).

<sup>24</sup> *See* S. 792, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/792/text?q=%7B%22search%22%3A%5B%22dairy+pride+act%22%5D%7D&r=1&s=1>; *The Dairy Pride Act*, NAT’L MILK PRODUCERS FED’N, <https://www.nmpf.org/wp-content/uploads/2017/01/DAIRY-PRIDE-Act-One-Page.pdf> (last visited Oct. 7, 2019).

<sup>25</sup> *The Dairy Pride Act*, *supra* note 24.

to issue guidance for nationwide enforcement of its labeling requirements for dairy products.<sup>26</sup>

A press release from Tammy Baldwin's office explained that the FDA's lack of enforcement of dairy product labeling regulations has "led to the proliferation of mislabeled plant-based alternative products that contain a range of ingredients and nutrients that are often not equivalent to the nutrition content of dairy products."<sup>27</sup> Baldwin's office and supporters of the DAIRY PRIDE Act are, in fact, claiming that consumers are misled into thinking they are consuming dairy products and that plant-based alternatives are nutritionally equivalent to dairy milk,<sup>28</sup> which, in turn, hurts dairy farmers.<sup>29</sup>

FDA Commissioner Scott Gottlieb, who has both expressed support for choice and innovation in the marketplace, as well as concern for potential health implications that could result from mislabeled products, requested the public's guidance on this matter.<sup>30</sup> In September 2018, Gottlieb issued a request for information in the Federal Register to solicit insights from consumers into how they use plant-based alternative products and how they perceive labels that include terms like "milk" or "cheese."<sup>31</sup>

Despite the dairy industry's efforts, the DAIRY PRIDE Act did not survive its first introduction in 2017. However, Big Dairy will, apparently, not go down without a fight; in March 2019, the bill was reintroduced in the House and, as of January 2020, is awaiting a vote in the Committee on Health, Education, Labor, and Pensions.<sup>32</sup>

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<sup>26</sup> See S. 792, 116th Cong. § 4 (2019).

<sup>27</sup> *The Dairy Pride Act*, *supra* note 24.

<sup>28</sup> See *id.* (discussing that dairy products contain nutrients for healthy development, which are under-consumed by most Americans).

<sup>29</sup> *Id.*

<sup>30</sup> Scott Gottlieb, *Statement from DFA Commissioner Scott Gottlieb, M.D., on Modernizing Standards of Identity and the Use of Dairy Names for Plant-Based Substitutes*, U.S. FOOD & DRUG ADMIN. (Sept. 27, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-modernizing-standards-identity-and-use-dairy-names>.

<sup>31</sup> *Id.* ("We're interested to know if consumers are aware of, and understand, the nutritional characteristics and differences among these products – and between these products and dairy – when they make dietary choices for themselves and their families.").

<sup>32</sup> S. 792 *DAIRY PRIDE Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/792/all-actions?overview=closed#tabs> (last visited Feb. 5, 2020); see also S. 792, 116th Cong. (2019).

### 1. *The Historical Account of Big Dairy's Fight Against Plant-Based Competition*

Big Dairy's legal fight against plant-based competition did not begin in 2017. Efforts to thwart plant-based food competition started as early as the Nineteenth Century with a war against margarine.<sup>33</sup> The dairy industry entered politics in 1877 to prevent margarine from competing with butter.<sup>34</sup> That year, margarine had become popular in cities across the United States,<sup>35</sup> and similar to the plant-based industry today, it put pressure on the dairy industry.<sup>36</sup> State dairy associations began pressing the legislature for labeling statutes and antimargarine laws.<sup>37</sup> Nine years later, in 1886, thirty-four states and territories enacted margarine labeling legislation at the direct urging of dairy interests,<sup>38</sup> which eventually culminated in the passage of the federal Oleomargarine Act of 1886,<sup>39</sup> imposing taxes and fees on the production of margarine.<sup>40</sup> Wisconsin, one of the country's leading dairy states,<sup>41</sup> passed an Act in 1895 that prevented margarine from being dyed a buttery yellow.<sup>42</sup> The reasons were twofold: to prevent consumers from confusing it with the color of *original* butter and to

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<sup>33</sup> See Paul Shapiro, *Plant-Based 'Dairy' Products Aren't New. Neither is the U.S. Dairy Industry's Hostility*, WASH. POST (Oct. 19, 2018, 5:28 PM), [https://www.washingtonpost.com/opinions/plant-based-dairy-products-arent-new-neither-is-the-us-dairy-industrys-hostility/2018/10/19/7341108e-b36e-11e8-9a6a-565d92a3585d\\_story.html](https://www.washingtonpost.com/opinions/plant-based-dairy-products-arent-new-neither-is-the-us-dairy-industrys-hostility/2018/10/19/7341108e-b36e-11e8-9a6a-565d92a3585d_story.html) (discussing the dairy industry's battle against margarine in the mid-1800s); see also, Rose Eveleth, *Is Lab-Grown Meat Really Meat?: A Labelling War is Brewing*, SLATE (July 11, 2018, 8:32 AM), <https://slate.com/technology/2018/07/should-lab-grown-meat-be-called-meat.html>; see also, Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989).

<sup>34</sup> Miller, *supra* note 33, at 108.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 108–09.

<sup>39</sup> *Id.* at 83–84.

<sup>40</sup> April White, *When Margarine Was Contraband*, JSTOR DAILY (Aug. 24, 2017), <https://daily.jstor.org/when-margarine-was-contraband/>.

<sup>41</sup> According to Statista, Wisconsin is the second largest milk producing state in the United States. See M. Shahbandeh, *Top 10 Milk Producing U.S. States from 2016 to 2018 (in Million Pounds)*, STATISTA (Apr. 3, 2019), <https://www.statista.com/statistics/194968/top-10-us-states-by-milk-production/> (last visited Feb. 5, 2020).

<sup>42</sup> Chris Foran, *Wisconsin Banned Selling Yellow Margarine for 72 Years, so Residents Smuggled It in from Illinois*, MILWAUKEE J. SENTINEL (Aug. 28, 2019), <https://www.jsonline.com/story/news/special-reports/dairy-crisis/2019/08/28/protect-dairy-industry-wisconsin-tried-keep-yellow-margarine-out-oleo-run/1950671001/>.



make it look less appetizing.<sup>43</sup> However, consumers were still able to purchase margarine, but were forced to pay an extra tax on it.<sup>44</sup> While the laws did initially impact the margarine industry negatively, the industry was able to circumvent the laws by producing margarine differently, giving it a naturally yellow tinge.<sup>45</sup> Only in 1950 did the federal government pass the Margarine Tax Act to repeal taxes on the product after listening to consumer preferences.<sup>46</sup> According to Geoffrey Miller, the fight against margarine was one of “the earliest examples of special interest lobbying by one domestic industry for federal protection against competition from another, less powerful, domestic industry.”<sup>47</sup>

The more recent labeling battle between the dairy and plant-based industries started in 1997 after Soyfoods Association of America petitioned the FDA for permission to call their product “soymilk.”<sup>48</sup> In 2000, the FDA agreed, which prompted the National Milk Producers Federation to file a complaint with the FDA and request that the term “milk” be used only on animal-derived products.<sup>49</sup> The FDA refused to weigh in and has yet to take a stand.<sup>50</sup>

Several states have taken the matter into their own hands and have passed statutes to restrict the labeling of “milk” on plant-based products. For instance, in 2017, North Carolina ratified Senate Bill 711, also known as the North Carolina Farm Act of 2018, imposing a mandatory-labeling requirement which prohibits the sale of plant-

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<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> Miller, *supra* note 33, at 84 (footnote 3).

<sup>46</sup> White, *supra* note 40.

<sup>47</sup> Miller, *supra* note 33, at 83.

<sup>48</sup> Peter Golbitz, *Citizen Petition*, SOYFOODS ASS’N OF AM. (Feb. 28, 1997), <http://www.soyfoods.org/wp-content/uploads/SANA-Citizen-Petition-No.-97P-0078-2-28-97.pdf>.

<sup>49</sup> Emily Atkin, *The War on Soy Milk*, THE NEW REPUBLIC (July 20, 2018), <https://newrepublic.com/article/150006/war-soy-milk>; *see also* Dan Charles, *Soy, Almond, Coconut: If It’s Not from a Cow Can You Legally Call It Milk?*, NPR (Dec. 21, 2016, 4:56 AM), <https://www.npr.org/sections/thesalt/2016/12/21/506319408/soy-almond-coconut-if-its-not-from-a-cow-can-you-legally-call-it-milk>.

<sup>50</sup> *See supra* note 49 and accompanying text.

based products labeled as milk.<sup>51</sup> The ratified bill has not yet been enforced as it is awaiting the ratification by ten other southern states.<sup>52</sup>

## 2. Recent Legal Trends

Meat alternatives have experienced their own tribulations. In 2018, Missouri passed a law against “misrepresenting a product as meat that is not derived from harvested production livestock or poultry,”<sup>53</sup> making it the first state in the country to restrict plant-based substitutes to be labeled as “meats.”<sup>54</sup> Mississippi passed a similar law that went into effect on July 1, 2019.<sup>55</sup> According to the law, what has been referred to as a “veggie burger” can no longer be called that.<sup>56</sup> However, in September 2019, following a lawsuit by plant-based advocates, Mississippi announced that it was considering allowing companies to keep the meat label.<sup>57</sup>

Mississippi was not the only state to be sued after passing a law restricting the labeling of plant-based products. Arkansas passed Act 501, also known as the ‘Truth in Labeling’ bill.<sup>58</sup> This law has been referred to as “perhaps the most extraordinarily far-reaching food-

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<sup>51</sup> Jonathan Carey, *In North Carolina, Big Ag Tells You What Is ‘Milk’*, HUFF POST (Sept. 21, 2018), [https://www.huffpost.com/entry/north-carolina-agricultural-laws\\_b\\_5ba2ade6e4b0fc9c379c0fc9](https://www.huffpost.com/entry/north-carolina-agricultural-laws_b_5ba2ade6e4b0fc9c379c0fc9).

<sup>52</sup> Samantha Hogan, *Political Notes: Dairy Compact Would Ban Labeling Soy and Almonds as ‘Milk’*, FREDERICK NEWS POST (Mar. 21, 2019), [https://www.fredericknewspost.com/news/economy\\_and\\_business/agriculture/political-notes-dairy-compact-would-ban-labeling-soy-and-almonds/article\\_394bfc49-5b45-535a-8ad7-824375adba32.html](https://www.fredericknewspost.com/news/economy_and_business/agriculture/political-notes-dairy-compact-would-ban-labeling-soy-and-almonds/article_394bfc49-5b45-535a-8ad7-824375adba32.html) (discussing that, as of March 2019, North Carolina and Maryland have ratified the law, leaving nine other states to fill the slots).

<sup>53</sup> S.B. 627 & 925, 99th Gen. Assemb., 2d Spec. Sess. (Mo. 2018).

<sup>54</sup> Dan Flynn, *Promised Meat Labeling Compromise Fails to Materialize in Missouri Federal Court*, FOOD SAFETY NEWS (July 15, 2019), <https://www.foodsafetynews.com/2019/07/promised-meat-labeling-compromise-fails-to-materialize-in-missouri-federal-court/>.

<sup>55</sup> See Rich Haridy, *The Burger Battle: The Lawsuits Challenging Restrictions on Plant-Based Meat Labels*, NEWS ATLAS (July 25, 2019), <https://newatlas.com/plant-based-meat-food-label-law-battle/60748/>.

<sup>56</sup> *Id.*

<sup>57</sup> See Emily Wagster Pettus, *Mississippi: Veggie Burgers Must be Clearly Labeled*, ASSOCIATED PRESS (Sept. 6, 2019), <https://www.apnews.com/5ec4a5bf1c3d4ac7b6800bcd41379030> (“Mississippi is considering new rules that let companies continue to use food-labeling terms such as ‘veggie burger’ and ‘vegan bacon,’ as long as the terms are prominently displayed so consumers understand the products are not meat.”).

<sup>58</sup> See Haridy, *supra* note 55; see also H.B. 1407, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019).

labeling law in this new wave of pro-animal product regulations.”<sup>59</sup> It covers animal-based products, including meats, dairy, viticulture, horticulture, and bee-related products.<sup>60</sup> It is, therefore, not surprising that lawsuits followed. The American Civil Liberties Union (ACLU) and others have challenged the law on behalf of Tofurky, a popular meat alternative company, on constitutionality grounds, claiming that it violates the First Amendment<sup>61</sup> and restricts commercial free speech.

The landmark Supreme Court case on the regulation of commercial free speech—*Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*—struck down a New York state law that prohibited a utility company from promotional advertising and created a four-prong test to determine when commercial free speech can be regulated without violating the First and Fourteenth Amendments of the Constitution.<sup>62</sup> First, if the communication is misleading to the public or related to unlawful activity, the Court held that commercial speech is not protected by the First Amendment.<sup>63</sup> Second, if the commercial speech is neither misleading nor related to unlawful activity, the government must articulate a substantial government interest to justify the restriction.<sup>64</sup> Third, there must be a direct link between the government interest and the restrictive regulation.<sup>65</sup> Finally, the regulation must be the least restrictive means available to achieve that interest.<sup>66</sup>

In a statement made to the FDA, the ACLU noted that advertising and labeling of products qualify as commercial speech.<sup>67</sup> It is, therefore, surprising that the controversial regulations mentioned above, including the DAIRY PRIDE Act, have passed or might pass constitutional muster under this four-prong analysis. In the statement to the FDA, the ACLU argues that, rather than regulating the advertising and labeling of certain products more comprehensively than others, the agency should regulate products comprehensively in

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<sup>59</sup> See Haridy, *supra* note 55.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *ACLU Comments to the Food and Drug Administration on First Amendment Issues*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/aclu-comments-food-and-drug-administration-first-amendment-issues#ftnref10> (last visited on Feb. 6, 2020).

ways that do not unjustifiably impose restrictions on commercial speech.<sup>68</sup>

These unjustified restrictions on commercial speech in the food industry have not always been successful. The FDA's recent attempt to support an industry's appropriation of the word "mayo"—short for mayonnaise—and ultimately restrict its commercial speech, failed. In August 2015, the FDA sent a warning letter to Hampton Creek Foods contending that its popular egg-free, vegan mayonnaise, "Just Mayo," is misbranded and misleading to consumers.<sup>69</sup> Only four months later, the FDA and Hampton Creek announced that they came to an agreement whereby the company committed to changing its labels to ensure that its products are labeled truthfully and are not misleading to the public.<sup>70</sup> Interestingly, a few years prior to the FDA's inquiry into the product, Unilever, one of the world's largest conglomerates owning Hellmann's mayonnaise, filed a lawsuit against Hampton Creek for false advertising.<sup>71</sup> After dropping the suit a few months later, Unilever stated that it would continue to pursue the matter with "industry groups and appropriate regulatory authorities,"<sup>72</sup> suggesting Unilever might have been behind the FDA's inquiry into Hampton Creek in the first place.<sup>73</sup>

The above lawsuits challenging restrictive labeling laws as well as Big Dairy's recent failed attempt against Hampton Creek seem to show a pattern that would also suggest the DAIRY PRIDE Act might not survive a second time. However, if it does pass, many are worried about the impacts this bill could have on the future of food labeling, consumer perception, and most importantly, product innovation.

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<sup>68</sup> *Id.* ("The FDA should not regulate certain products' advertising and labeling more comprehensively than others simply due to product type, because such an approach does not constitute the least restrictive means. Nor is it the most narrowly tailored way to achieve the agency's objective of furthering public health.").

<sup>69</sup> William A. Correll, *Warning Letter: Hampton Creek Foods*, U.S. FOOD & DRUG ADMIN. (Aug. 12, 2015), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/hampton-creek-foods-08122015>.

<sup>70</sup> Deena Shanker, *The FDA Has Decided that Vegan Just Mayo is Actually Mayo After All*, QUARTZ (Dec. 17, 2015), <https://qz.com/576679/the-fda-decides-that-vegan-just-mayo-is-actually-mayo-after-all/>.

<sup>71</sup> Heather Kelly, *'Just Mayo' Not Actually Mayo, Says FDA*, CNN (Aug. 25, 2015), <https://money.cnn.com/2015/08/25/news/companies/just-mayo-fda/?iid=EL>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

### III. IMPACT

#### A. *Impact on the Consumer*

What the state regulations, mentioned above, and the DAIRY PRIDE Act have in common is the contention that current labeling of plant-based products is misleading to consumers. In discussing the potential impacts of the DAIRY PRIDE Act, opponents of the Act suggest that changing the labels of popular plant-based products could lead to a more confused consumer, rather than alleviate consumer confusion.<sup>74</sup> In a statement made about the ACLU's lawsuit against Arkansas about plant-based meats, ACLU Staff Attorney Brian Hauss stated the following:

Businesses often rely on figurative language to help communicate information about the flavor, texture, or appearance of their products. Consumers know that 'peanut butter' is not made from cows, but the product's name efficiently informs them that it spreads like butter. 'Veggie bacon' is appealing to consumers who enjoy the distinctive taste, smell, and crunch of conventional bacon, but who prefer plant-based foods for any number of personal reasons. If companies are forced to describe their products as 'savory plant-based protein,' consumers are likely to be much *more* confused about exactly what it is they're putting on their plates. And that's the real purpose of these label

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<sup>74</sup> According to Michael Lynch, Vice President of popular plant-based company Daiya Foods, "Plant-based consumers are well-educated and read labels. They know exactly what they are buying and are making informed purchase decisions. Where legislators are suggesting that current labeling is confusing consumers, I'd like to argue that changing what consumers are currently familiar with would cause greater confusion in the grocery aisle."

Christina Troitino, *The Dairy Pride Act's Beef with Plant-Based Milk*, FORBES (Apr. 6, 2017), <https://www.forbes.com/sites/christinatroitino/2017/04/06/the-dairy-pride-acts-beef-with-plant-based-milk/#13c70659454d>; see also, Atkin, *supra* note 49 ("[R]equiring any sort of change would certainly confuse consumers, who have been buying almond milk and soy milk for decades."); see also *Voluntary Standards for the Labeling of Plant-Based Milks in the United States*, PLANT-BASED FOOD ASS'N, <https://plantbasedfoods.org/policy-and-advocacy/voluntary-standards/> (last visited Oct. 19, 2019) (reporting that a recent survey found that consumers associated terms such as "beverage" or "drink" to soft drinks and alcohol, rather than a product that one would put in coffee or with cereal).

ensorship laws: creating confusion to protect favored economic interests.<sup>75</sup>

In fact, it is unlikely consumers are even confused about the term “milk” displayed on plant-based products to begin with, as the dairy industry contends. Recent court opinions have confirmed this belief. In *Gitson v. Trader Joe’s*, Judge Vince Chhabria dismissed claims against retailer Trader Joe’s, alleging that the term “soymilk” used in Trader Joe’s products mislead consumers and violated FDA regulations.<sup>76</sup> He indicated that the word “soy” before the word “milk” clears up any confusion the consumer may have as to the contents of the product.<sup>77</sup> As for the argument that consumers are misled into believing plant-based milks are as healthy and nutritious as dairy milks, Judge Chhabria noted that “a reasonable consumer (indeed, even an unsophisticated consumer) would not assume that two distinct products have the same nutritional content; if the consumer cared about the nutritional content, she would consult the label.”<sup>78</sup>

In another California case, *Painter v. Blue Diamond*, the court also dismissed a claim against a large plant-based company alleging that using the term “milk” misled consumers about the nutritional equivalency of the product.<sup>79</sup> The court held that “[b]y using the term ‘almond milk’, even the least sophisticated consumer would know instantly the type of product they are purchasing. If the consumer is concerned about the nutritious qualities of the product” the judge noted, “they can read the nutrition label.”<sup>80</sup>

It is apparent that consumers are not confused about what they are purchasing.<sup>81</sup> On the contrary, they are purposefully seeking out plant-

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<sup>75</sup> Haridy, *supra* note 55.

<sup>76</sup> *Gitson v. Trader Joe’s Co.*, No. 13-CV-01333-VC, 2015 U.S. Dist. LEXIS 170401, at \*8 (N.D. Cal. Dec. 1, 2015).

<sup>77</sup> *See id.* at \*4 (“[I]t is simply implausible that a reasonable consumer would mistake a product like soymilk or almond milk with dairy milk from a cow. The first words in the products’ names should be obvious enough to even the least discerning of consumers.” (quoting *Ang v. Whitewave Foods Co.*, 2013 U.S. Dist. LEXIS 173185, 2013 WL 6492353, at \*4 (N.D. Cal. Dec. 10, 2013)).

<sup>78</sup> *Id.*

<sup>79</sup> *Painter v. Blue Diamond Growers*, No. CV 17-02235-SVW-AJW, 2017 U.S. Dist. LEXIS 215086, at \*23 (C.D. Cal. May 24, 2017).

<sup>80</sup> *Id.* at \*6–7.

<sup>81</sup> In response to FDA Commissioner Gottlieb’s 2018 request for information, Linkage Research and Consulting, a company commissioned by the Plant Based Foods Association, analyzed data about the labeling of plant-based products. Linkage Research found that seventy-eight percent of people who only drink dairy

based alternatives to dairy milk for many different reasons already discussed above.<sup>82</sup> Plant-based alternatives have been in the market for decades and have used terms like “milk” or “ice cream” since the beginning. However, the plant-based industry did not face these types of challenges when their products were considered “niche items” and not seen as competing with dairy products.<sup>83</sup> The dairy industry is desperate and is attempting to thwart the popularity of the plant-based industry. The question becomes whether their efforts will be successful.

### B. *Impact on the Plant-Based Industry*

Should the DAIRY PRIDE Act pass, its supporters—supporters who believe that confused consumers are being misled into thinking they are purchasing dairy milk, or a healthier plant-based alternative—believe that the Act will better inform consumers about their purchases. As a further consequence, they hope to stifle the plant-based industry to regain market share for the dairy industry.

That is unlikely to happen. Even if the bill passes, it will not significantly impact the marketing or sales of plant-based products.<sup>84</sup> Consumers, who are likely not confused about current dairy alternative labels, will probably continue to seek out their favorite products despite being labeled differently.<sup>85</sup> The main reason is that they are

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milk refer to plant-based milk alternatives as “milk,” suggesting that even non-consumers are not confused about labeling plant-based alternatives as “milk.” Janet Forgive, *Consumers Show They Know Almond Milk Doesn't Come from Cows*, FORBES (Apr. 25, 2019), <https://www.forbes.com/sites/janetforgrieve/2019/04/25/consumers-show-they-know-almond-milk-doesnt-come-from-cows/#a1425f040686>; see Michele Simon, *Plant Based Foods Association Statement on the Introduction of the Dairy Pride Act of 2019*, PLANT-BASED FOODS ASS'N (Mar. 14, 2019), <https://plantbasedfoods.org/plant-based-foods-association-statement-on-the-introduction-of-the-dairy-pride-act-of-2019/> (“[The DAIRY PRIDE Act] is a solution in search of a problem: consumers are not confused about plant-based milk. They are purposefully seeking out plant-based dairy alternatives for a variety of individual reasons.”).

<sup>82</sup> Simon, *supra* note 81.

<sup>83</sup> Forgive, *supra* note 81.

<sup>84</sup> Cathy Seigner, *FDA Likely to Restrict 'Milk' Label to Dairy Products from Animals*, FOOD DIVE (July 18, 2018), <https://www.fooddive.com/news/fda-likely-to-restrict-milk-label-to-dairy-products-from-animals/527979>.

<sup>85</sup> *Id.*; see also Benjamin Kemper, *Nut Milks are Milk, Says Almost Every Culture Across the Globe*, SMITHSONIAN.COM (Aug. 15, 2018), <https://www.smithsonianmag.com/history/nut-milks-are-milk-says-almost-every-culture-across-globe-180970008>; see also Troitino, *supra* note 74 (arguing that the

now sufficiently familiar with the product and have already adopted it as an alternative or substitute to an existing product.<sup>86</sup>

European data suggests that legislation akin to the DAIRY PRIDE Act will probably not stifle the plant-based industry.<sup>87</sup> Across the Atlantic, countries have already passed restrictive labeling legislation. In 2017, the European Court of Justice (ECJ) offered a very strict interpretation of EU Regulation 1308/2013, which provides protections for dairy terms<sup>88</sup> on the use of the designations of milk products.<sup>89</sup> The Court ruled that the term “milk” is reserved for products derived from animals only.<sup>90</sup> Likewise, following a similar reasoning as the DAIRY PRIDE Act, France amended its agricultural bill in 2018 to prohibit any product that mostly contains non-animal ingredients from being labeled as a traditional animal product.<sup>91</sup> Notwithstanding the passage of laws and regulations restricting the use of the word “milk” to dairy products only, European sales for non-dairy milk alternatives continue to grow.<sup>92</sup> This, again, reaffirms that consumers make a conscious decision to select plant-based alternatives over dairy products.

While the DAIRY PRIDE Act and similar pieces of legislation are unlikely to have an impact on the plant-based industry on a large scale,

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DAIRY PRIDE Act has the potential to impact how and where plant-based products are placed on grocery store shelves. The article suggests that it may lead to grocery stores consciously separating dairy and plant-based products, which might impact the sale of plant-based products).

<sup>86</sup> See Kemper, *supra* note 85.

<sup>87</sup> See *infra* note 92 and accompanying text.

<sup>88</sup> See Commission Regulation 1308/2013 of Dec. 17, 2013, Establishing a Common Organisation of the Markets in Agricultural Products and Repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, 2013 O.J. (L 347) 671, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0671:0854:EN:PDF>.

<sup>89</sup> *EU-28: European Court Prohibits Use of Dairy Names for Non-Dairy Products*, U.S. DEP'T AGRIC., <https://www.fas.usda.gov/data/eu-28-european-court-prohibits-use-dairy-names-non-dairy-products> (last visited Jan. 14, 2020).

<sup>90</sup> *'A Good Day for Dairy' After European Court Judgment*, DW (June 14, 2017), <https://www.dw.com/en/a-good-day-for-dairy-after-european-court-judgment/a-39250661>.

<sup>91</sup> Malte B. Rödl, *Why France Banned 'Meat Names' for Vegetarian Alternatives*, INDEPENDENT (May 5, 2018), <https://www.independent.co.uk/life-style/food-and-drink/france-bans-meat-names-vegetarian-vegan-alternatives-a8330956.html>.

<sup>92</sup> A Market Data Forecast report analyzing the forecast of Europe's dairy alternative market found that the market, worth USD 3.1 billion in 2019, is estimated to be growing at a Compound Annual Growth Rate (CAGR) of 8.5%, and to reach USD 4.5 billion by 2025. *Europe Dairy Alternative Market*, MARKET DATA FORECAST (Aug. 2019), <https://www.marketdataforecast.com/market-reports/europe-dairy-alternatives-market>.



they could potentially be devastating to small, startup companies due to the cost of packaging revamps.<sup>93</sup> The most significant impact, however, will arguably be to the future of product innovation.

### C. *Impact on Product Innovation*

In many industries, including the food industry, the application of new technologies has often been linked to economic progress.<sup>94</sup> The United States Chamber of Commerce Foundation, an affiliate of the U.S. Chamber of Commerce, released an executive summary indicating that economists have calculated that fifty percent of the American annual Gross Domestic Product (GDP) is associated with increases in innovation.<sup>95</sup> Thus, innovation and product development are key aspects of economic growth.<sup>96</sup>

Despite the initial costs associated with the research and development of a new product or product line, the vast majority of companies choose to develop new foods for financial reasons, often indicating that one of their main driving forces is to increase the long-term profitability of their company.<sup>97</sup> Other driving forces include hopes of gaining new customers, expanding new markets geographically, elevating brand excitement, and increasing market

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<sup>93</sup> Brad Avery, *Plant-Based Brands Lobby Against Dairy Pride Act*, BEVNET (Nov. 6, 2017), <https://www.bevnet.com/news/2017/plant-based-brands-lobby-dairy-pride-act>; see also Sipple, *supra* note 20; Kimberly Leonard, *Got Alt-Milk? Trump Administration Takes Up Battle over Dairy Imitators*, WASH. EXAM'R (July 26, 2018), <https://www.washingtonexaminer.com/policy/healthcare/got-alt-milk-trump-administration-takes-up-battle-over-dairy-imitators> (“Changing labeling would be difficult and costly for companies, particularly startups.”).

<sup>94</sup> FADI ARAMOUNI & KATHRYN DESCHENES, *METHODS FOR DEVELOPING NEW FOOD PRODUCTS 2* (DEStech Publications, Inc., 2nd ed., 2018).

<sup>95</sup> *Executive Summary*, U.S. CHAMBER FOUND., <https://www.uschamberfoundation.org/enterprisingstates/assets/files/Executive-Summary-OL.pdf> (last visited Feb. 8, 2020).

<sup>96</sup> See ARMIN SCHMUTZLER, *IS COMPETITION GOOD FOR INNOVATION? A SIMPLE APPROACH TO AN UNRESOLVED QUESTION 1* (now Publishers, Inc, 2010) (explaining that “[i]nnovation is regarded as an ‘engine for economic growth.’”); see also Pece et al., *Innovation and Economic Growth: An Empirical Analysis for CEE Countries*, 26 *PROCEDIA ECON. AND FIN.* 461, 462 (2015), <https://reader.elsevier.com/reader/sd/pii/S2212567115008746?token=0206F2A5B98253582FE0779C3FFA8BD2ED20BAB7C06F7FFBF84E1A41EE59288C0AAA794D3C9BCD5734DCAB5D73F0C51E> (“[The connection between economic growth and innovation] has its origin in the research realized by [Solow], who pointed out the existence of a long term relationship between economic growth and innovation.”).

<sup>97</sup> ARAMOUNI & DESCHENES, *supra* note 94, at 2.

share.<sup>98</sup> Arguably one of the most important driving forces of innovation and product development is responding to current consumer trends and changes in the marketplace.<sup>99</sup> The consumer shift towards a more plant-based, dairy-free diet is a relevant example.

Thirty years ago, grocery stores and restaurants did not offer nearly as many plant-based alternatives to animal products as they do today. Back then, those interested in consuming plant-based alternatives were forced to travel to their small health-food stores to—maybe—find what they were looking for.<sup>100</sup> Ryan Andrews, the Director of Education at Precision Nutrition, noted that vegan options, back then, were extremely limited in their variety, selection, and convenience, which likely discouraged many to consume a plant-based diet.<sup>101</sup>

Gone are the days when vegans wandered the grocery store aisles hopelessly looking for meat and dairy alternatives.<sup>102</sup> As consumer trends in plant-based and dairy-free diets have gradually matured, for the many reasons mentioned earlier, food manufacturers have adapted, innovated, and perfected products for the new wave of consumers. Those who have lived through this shift recognize and appreciate the difference in the innovation and availability of certain products.<sup>103</sup>

### 1. *Industry Concentration and its Impact on Innovation and Competition*

A company's adaptation to consumer trends and search for long-term profitability through product innovation is inevitably linked to

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<sup>98</sup> *Id.* at 1.

<sup>99</sup> *Id.* at 2.

<sup>100</sup> See Christine Kasum Sexton, *Top Vegan Foods 30 Years Ago Vs. Today*, THE VEGETARIAN RES. GRP., [https://www.vrg.org/journal/vj2012issue3/2012\\_issue3\\_30\\_years\\_ago.php](https://www.vrg.org/journal/vj2012issue3/2012_issue3_30_years_ago.php) (last visited Jan. 14, 2020).

<sup>101</sup> See *id.* (discussing that the top vegan foods thirty years ago included tofu, granola, and carrots).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (“For years after becoming vegan, [Reed Mangels, PhD] says that she did not eat the vegan cheeses that were available. ‘Early vegan cheese tasted like soap and didn’t melt,’ she remembers. The newer vegan cheese varieties do melt and have more of a greasy, salty cheese taste.”); see also *id.* (“[S]oymilks had awful tastes, and they were too thick, plain, or just plain bitter-tasting . . . [M]eat analogues . . . had extremely chewy or mushy textures. The addition of soy isolates helped and improved the taste of many products.”); see also, Rachel Estabrook, *Cracking the Code: Making Vegan Cheese Taste Cheesier*, NPR: THE SALT (Apr. 30, 2012), <https://www.npr.org/sections/thesalt/2012/04/30/151687828/cracking-the-code-making-vegan-cheese-taste-cheesier> (explaining the evolution and development of plant-based cheeses).

competition.<sup>104</sup> A recent study analyzed the causal effect of competition on step-by-step innovation.<sup>105</sup> The researchers found that an increase in competition significantly increases research and development investments by companies who are “neck-and-neck.”<sup>106</sup> They further found that “[an increase in] competition affects industry composition by reducing the fraction of neck-and-neck sectors, and, overall, competition increases aggregate innovation.”<sup>107</sup>

Another study examining the impact of competition on market outcomes in innovative industries found that a lessening of competition affects research and development outcomes by directly reducing the number of companies in research and development of a new product.<sup>108</sup> Developing new products is not only considered to be a core element of free market competition,<sup>109</sup> but is also “fundamentally necessary” in order to “survive the market.”<sup>110</sup> Thus, it is not surprising that opponents of the DAIRY PRIDE Act have criticized the anti-competitive nature of the bill as an attempt to eliminate plant-based competition altogether by restricting the way in which these products can be labeled.<sup>111</sup>

In a Harvard Business Review article, David Wessel examined how large companies, “using their size and strength to crush potential competitors,” have affected competition, and consequently, the U.S.

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<sup>104</sup> See BRUCE TRAILL & KLAUS G. GRUNERT, PRODUCTS AND PROCESS INNOVATION IN THE FOOD INDUSTRY 1 (Chapman & Hall 1997) (“Innovation is . . . regarded as a major source of competitive advantage for a food company.”).

<sup>105</sup> Phillippe Aghion et al., *The Causal Effects of Competition on Innovation: Experimental Evidence*, 34 J. LAW, ECON., AND ORG. 162, 164 (2018).

<sup>106</sup> *Id.* at 165.

<sup>107</sup> *Id.*

<sup>108</sup> Guillermo Marshall & Álvaro Parra, *Innovation and Competition: The Role of the Product Market*, 65 INT’L J. INDUST. ORG. 221, 241 (2019).

<sup>109</sup> See *Does Competition Drive Innovation?*, EDISON AWARDS, <https://www.edisonawards.com/news/competition-drive-innovation/> (last visited Nov. 16, 2018) (noting that even in other industries, such as in technology, “[c]ompetition is a key driver of innovation. In open and competitive markets, firms are driven to adopt more efficient product processes, and to offer new and improved products and services to customers”).

<sup>110</sup> *Id.*

<sup>111</sup> Emily Byrd, *Dairy Pride Explained*, THE GOOD FOOD INST. (Feb. 19, 2017), <https://www.gfi.org/dairy-pride-explained> (explaining that Big Dairy is getting in the way of consumer choice, free market competition, and the growth of healthier, more humane, and more sustainable industries); Nicole Negowetti, *Baldwin’s Dairy Pride Bill Nothing to be Proud Of*, MILWAUKEE J. SENTINEL ONLINE (Jan 21, 2017), <https://www.jsonline.com/story/opinion/2017/01/21/negowetti-baldwins-dairy-pride-bill-nothing-proud/96895688>.

economy.<sup>112</sup> Wessel notes that, in some instances, concentrated industries—meaning big firms that account for higher shares of industry revenue and profits—can be benign consequences of innovation.<sup>113</sup> However, Wessel indicates:

“Most firms are actively engaged in protecting their source of competitive advantage through a mixture of innovation, lobbying, or both,” says Luigi Zingales of the University of Chicago. To the extent that firms are being driven to innovate, there is little to worry about. But when corporations use their market power to shape the policy and regulatory environment in ways that crush competition, problems arise. And unfortunately, there’s more than enough evidence to conclude that a substantial portion of the U.S. economy suffers from a lack of competition.<sup>114</sup>

In this case, by restricting a term and concentrating it to only one sector of the food industry, the DAIRY PRIDE Act risks stifling, not only plant-based product development, but food innovation as a whole. As Wessel explains, “[i]f we’re slow to take action to bolster competition—perhaps because incumbents successfully wield their power . . . —we risk diluting the dynamism of the economy and restricting the flow of innovations and new ideas, darkening the prospects for our children and grandchildren.”<sup>115</sup>

## *2. The Importance of the Concept Familiarity when Introducing Innovative Products*

Have you ever wondered why your grocery list looks virtually the same every week?<sup>116</sup> According to an article published in the Harvard Business Review, a leading market research firm found that, on average, seventy-five percent of consumer-packaged goods and retail products fail to earn over \$7.5 million during their first year of

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<sup>112</sup> David Wessel, *Is Lack of Competition Strangling the U.S. Economy?*, HARV. BUS. REV. (2018), <https://hbr.org/2018/03/is-lack-of-competition-strangling-the-u-s-economy>.

<sup>113</sup> See *id.* (discussing that Big firms such as “Amazon, Apple, Facebook, and Google have risen to the top because of their propensity to innovate”).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See Erika Beras, *People Pick Familiar Foods over Favorites*, SCI. AM. (Nov. 27, 2015), <https://www.scientificamerican.com/podcast/episode/people-pick-familiar-foods-over-favorites/>.

business.<sup>117</sup> The main reason attributed to the failure of most product launches is the “intransigence of consumer shopping habits.”<sup>118</sup> A consultant for the firm, Jack Trout, found that American families do not often purchase new products, and instead tend to purchase the same 150 items for eighty-five percent of their household needs.<sup>119</sup> As a result, on average, out of 30,000 new consumer products that are launched annually, eighty to ninety-five percent of them fail.<sup>120</sup> Specifically, in the food sector, “[t]he failure rate for new products . . . is 70 to 80 percent.”<sup>121</sup>

A recent study discussed in *Scientific American* studied how people choose to purchase or consume particular foods.<sup>122</sup> The study asked thirty hungry individuals to rate a list of snacks based on their preferences.<sup>123</sup> The snacks themselves were not displayed but were associated with particular locations.<sup>124</sup> When the participants were asked to pick two locations as proxies for the snacks, the study found—by looking at scans of the participants’ brains—that the participants chose the locations based off their memory, rather than their snacks preference, suggesting that familiarity of a product is one of the most important factors for a consumer when making a purchasing decision.<sup>125</sup> Another study found that food identity information presented as names on food labels influence, among other things, the liking and familiarity of tastes.<sup>126</sup> In particular, the study determined

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<sup>117</sup> Joan Schneider & Julie Hall, *Why Most Product Launches Fail*, HARV. BUS. REV. (April 2011), <https://hbr.org/2011/04/why-most-product-launches-fail>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Lonny Kocina, *What Percentage of New Products Fail and Why?*, MARKETSMART NEWSLETTERS (May 3, 2017), <https://www.publicity.com/marketsmart-newsletters/percentage-new-products-fail/>.

<sup>121</sup> *Id.*

<sup>122</sup> Beras, *supra* note 116.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*; see also Ellen Van Kleef et al., *Consumer Research in the Early Stages of New Product Development: A Critical Review of Methods and Techniques*, 16 FOOD QUALITY AND PREFERENCE 181, 184 (2004) (“[W]hen participants are more familiar with a product, the quantity of accessible information in memory is higher . . . . In contrast, consumers have often [sic] difficulties in evaluating major innovations. In particular, it can be unclear for consumers to understand what needs the new products could satisfy. The difficulty of evaluation of such products depends on the type of information and knowledge that consumers have about the particular attributes of a product. In case a consumer has minimal experience with the product, it is difficult to retrieve the relevant attributes to evaluate the product.”).

<sup>126</sup> Masako Okamoto et al., *Influences of Food-Name Labels on Perceived Tastes*, 34 CHEM. SENSES 187, 193 (2008).

that we, as consumers, prefer foods that are perceived as being congruent with the names on food labels.<sup>127</sup>

Consumer familiarity of a product and the term to describe said product are precisely the reason why plant-based alternatives have used the term “milk” to describe their beverages. The co-founder of the Good Food Institute, Bruce Friedrich, noted that “[f]or the same reason that you can have gluten-free bread and rice noodles, almond milk and soy milk are the most clear and best terms for describing those products.”<sup>128</sup> Consumers are familiar with dairy milk and the ways in which it can be used and consumed.<sup>129</sup> In a comment to FDA Commissioner Gottlieb, the Plant Based Foods Association explained why dairy descriptors are used by many in the plant-based industry:

Companies selling dairy alternatives are using easy to understand, clear, descriptive and truthful language on labels. Our members and others in this category, are using common English words that consumers understand: milk, cheese, yogurt and butter. To our members, and to consumers, these words represent functionality, form and taste . . . .<sup>130</sup>

Similarly, Michele Simon, the executive director of the Plant Based Foods Association, noted that “[t]here’s just limited words in the English language to convey a concept that the consumer already understands.”<sup>131</sup> She added: “[i]f you want to convey something tastes like bacon, what do you do? Do you say it’s salty and fatty and, wink wink, pig-like? The point is that we should not have to engage in linguistic gymnastics.”<sup>132</sup>

Therefore, the terms ‘milk’ and ‘cheese’ are both familiar to consumers and congruent with the appearance of dairy milk

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<sup>127</sup> *Id.* at 190.

<sup>128</sup> See Candice Choi, *Soy “Milk” Makers May Need to Find Alternative Description*, AP (July 18, 2018), <https://apnews.com/574a162fd7f24817b7647ce704d5dd98/Soy-%22milk%22-makers-may-need-to-find-alternative-description>.

<sup>129</sup> See Michele Simon, *PBFA Comments Submitted to the Request for Information from FDA*, PLANT BASED FOODS ASS’N (Jan. 27, 2019), <https://plantbasedfoods.org/pbfa-comments-submitted-to-the-request-for-information-from-fda/> (“[P]lant-based milks function much the same way as cow’s milk and consumers use them as others may use cow’s milk, with ‘on cereal’ being cited as the leading use of plant-based milk, followed by ‘as a drink.’”).

<sup>130</sup> *Id.*

<sup>131</sup> Bromwich & Yar, *supra* note 17.

<sup>132</sup> *Id.*

alternatives.<sup>133</sup> The Plant Based Foods Association has a point. “Nut juice” or “almond beverage” does not necessarily convey the essence of the product and that it can be used as an alternative to dairy milk.<sup>134</sup> Additionally, “nut juice” does not sound as appetizing as “almond milk.”

Because familiarity is central to the consumer purchasing decision, the more innovation and development in a product or product line, the “riskier it is to introduce and the more costly the marketing strategies of that novelty.”<sup>135</sup> In his book, Gordon Fuller uses the Walkman to exemplify this concept.<sup>136</sup> He notes that “[t]he Walkman was a radical, innovative, and conceptual change in communications.”<sup>137</sup> As such, consumers had to be educated to its added value through creative marketing.<sup>138</sup> On the other hand, the development of a more conceptually familiar product, like frozen dinners, did not require as much research, development, and creative marketing.<sup>139</sup>

Familiarity is particularly important to appeal to new customers.<sup>140</sup> Miyoko Schinner, a California producer of cashew-milk cheese, resorted to calling her product “cultured nut product” or “Aged English Sharp Farmhouse” after the state of California prevented her from labeling her product “cheese.”<sup>141</sup> She explained that people who were already familiar with the product and its name knew that “cultured nut product” meant “cheese.”<sup>142</sup> However, it is important to Ms. Schinner and other vendors to “use words that people recognize on their packaging.”<sup>143</sup>

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<sup>133</sup> See generally, Okamoto et. al, *supra* note 126.

<sup>134</sup> See Meagan Morris, *Would You Buy Almond Nut Juice? FDA to Crack Down on Nut ‘Milks’*, METRO (July 19, 2018), <https://www.metro.us/body-and-mind/health/would-you-drink-nut-juice> (“It’s easy to see why we call it nut milk: The creamy texture visually looks more like dairy milk than anything else. Nut juice doesn’t seem right . . . , because we’re used to the consistency of fruit juices that have a thinner texture.”); see also Nellie Bowles, *Got Milk? Or Was that Really a Plant Beverage?*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/business/milk-nut-juice-plant-beverage-label.html>.

<sup>135</sup> GORDON W. FULLER, *NEW FOOD PRODUCT DEVELOPMENT: FROM CONCEPT TO MARKETPLACE 10* (Taylor & Francis Group, 3rd ed., 2011).

<sup>136</sup> See *id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 10, 16.

<sup>139</sup> See *id.* at 10–11.

<sup>140</sup> Bromwich & Yar, *supra* note 17.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

Using terms that are familiar to consumers is also important for a product's placement in a grocery store.<sup>144</sup> It helps convince vendors, who have the final say in the placement of products,<sup>145</sup> "to sell the products next to those they resemble."<sup>146</sup> Two of the most recent and popular innovations in the plant-based industry—the Impossible Burger and the Beyond Burger—have been using the term "burger" and advertising their product as an animal meat-alternative.<sup>147</sup> Certain grocery stores across the United States have chosen to place the Beyond Burger alongside other meats in the meat department.<sup>148</sup>

### 3. *The Impact on Innovation for Established Companies and Startup Companies*

As mentioned above, introducing innovative products is risky and costly, particularly when the consumer is not familiar with the product.<sup>149</sup> Impossible Foods, the company that created the Impossible Burger, was founded in 2011 by a Stanford University Professor who decided to take his biochemistry degree and career on a different path.<sup>150</sup> After years of research and development to create the perfect meatless patty, the company launched the Impossible Burger in

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<sup>144</sup> See Carmen Reinicke, *Beyond Meat Shares Fall Short on Report that some Grocery Stores Aren't Sure it Belongs in the Meat Aisle*, BUS. INSIDER (June 6, 2019), [https://markets.businessinsider.com/news/stocks/beyond-meat-stock-price-falls-on-grocery-store-aisle-report-2019-6-1028260592?utm\\_source=markets&utm\\_medium=ingest](https://markets.businessinsider.com/news/stocks/beyond-meat-stock-price-falls-on-grocery-store-aisle-report-2019-6-1028260592?utm_source=markets&utm_medium=ingest) ("Placement in the vegan or vegetarian aisle could make it harder to attract new customers.").

<sup>145</sup> *Id.* ("Ultimately, grocery stores decide where the product lives within each store.").

<sup>146</sup> Bromwich & Yar, *supra* note 17.

<sup>147</sup> See IMPOSSIBLE FOODS, <https://impossiblefoods.com/food/> (last visited Nov. 16, 2019).

<sup>148</sup> See *Aisle be Seeing You: Why Retail Placement is so Important to Plant-Based Substitutes*, MCMILLAN DOOLITTLE (June 24, 2019), <https://www.mcmillandoolittle.com/beyond-meat-and-similar-companies-are-leading-the-charge-in-repositioning-the-entire-meat-department-into-a-protein-department-in-all-its-many-forms-and-this-is-forcing-larger-players-to-react/>; see also Carmen Reinicke, *Kroger is Testing How Grocery Shoppers Will React to Plant-Based 'Meat' in the Traditional Meat Aisle*, BUS. INSIDER (Sept. 10, 2019), <https://markets.businessinsider.com/news/stocks/kroger-pbfa-testing-plant-based-meat-in-traditional-meat-aisle-2019-9-1028513356> (discussing that Kroger and the Plant-Based Foods Association are conducting an experiment in certain Kroger stores around the country whereby they placed plant-based burgers in the meat aisle for twenty weeks to see if it will impact the sales of the product).

<sup>149</sup> See *supra* notes 135-39 and accompanying text.

<sup>150</sup> *About Impossible Foods*, IMPOSSIBLE FOODS, <https://impossiblefoods.com/company/overview/> (last visited Feb. 10, 2020).



2016.<sup>151</sup> Luckily, the company has been able to use the word “burger,” thus avoiding the additional expense of educating consumers about the added value of this meatless patty. Despite saving money on information campaigns, the Impossible Burger and other similar food innovations remain extremely expensive.<sup>152</sup> The Impossible Burger “looks, cooks, smells, sizzles and taste like conventional ground beef but is made entirely from plants.”<sup>153</sup> The research and development behind its recipe and its team of eighty scientists cost Impossible Foods nearly eighty million dollars.<sup>154</sup>

If a company is prevented from using a generic term that would help the consumer understand the value or use of the innovative product and that the innovative product can act as a supplement or substitute to an existent product, the company would have to spend additional resources to educate the consumer about the product’s added value and use.<sup>155</sup> In today’s competitive market, this would discourage many companies from finding alternatives to existing products, which in turn, might hinder innovation.<sup>156</sup> In fact, David Baskin, a senior research fellow at The Heritage Foundation noted that “[t]here’s a lot of innovation that is occurring right now in the food sector to meet the diverse needs of consumers.”<sup>157</sup> “This type of protectionist scheme discourages such innovation,” he added.<sup>158</sup>

In contrast, some would argue that product innovation may not be impacted if large, established companies choose to innovate. In this view, proponents of the DAIRY PRIDE Act and other similar restrictive labeling laws, may argue that familiarity is, in fact, central to the consumer purchasing decision.<sup>159</sup> However, it is the familiarity

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<sup>151</sup> *Id.*

<sup>152</sup> See Khushbu Shah, *The Veggie Burger of the Future Cost \$80M to Invent—And Carnivores Will Be Impressed*, MIC (Jul. 27, 2016), <https://www.mic.com/articles/149859/impossible-burger-the-veggie-burger-of-the-future-cost-80m-to-invent-and-carnivores-will-be-impressed>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See FULLER, *supra* note 135, at 10.

<sup>156</sup> See Troitino, *supra* note 74.

<sup>157</sup> Ashley Herzog, *FDA Considers Changing Labeling Requirements for Nondairy ‘Milk’ Products*, THE HEARTLAND INST. (June 3, 2019), <https://www.heartland.org/news-opinion/news/fda-considers-changing-labeling-requirements-for-nondairy-milk-products>.

<sup>158</sup> *Id.*; see also Jessi Devenyns, *Trade Group Issues Voluntary Plant-Based Meat Labeling Standards*, FOOD DIVE (Dec. 11, 2019), <https://www.fooddiver.com/news/trade-group-issues-voluntary-plant-based-meat-labeling-standards/568841/> (discussing that similar labeling restrictions applied to plant-based meat alternatives would also stifle innovation).

<sup>159</sup> See *supra* note 135 and accompanying text.

of a brand, not of a term or concept, that is the better identifier.<sup>160</sup> Nielsen's Global New Product Innovation conducted a survey examining consumers' purchasing habits. They found that six out of ten (fifty-nine percent) global respondents preferred to purchase new products from brands they were familiar with and twenty-one percent of respondents indicated that they purchased a new product because it belonged to a brand they enjoyed.<sup>161</sup>

A company's brand—particularly if the brand is established and well-known—is considered “one of the most valuable assets a company possesses.”<sup>162</sup> Consumers recognize a brand as invoking safety, reliability, quality, and credibility,<sup>163</sup> which lets customers know what to expect from it even if they are unfamiliar with the innovation.<sup>164</sup> Therefore, preventing an established company from using a term to describe its product might not affect the future of product innovation, as consumers will continue purchasing products from brands they like.<sup>165</sup>

While, according to some people, established companies might not be impacted by restrictive labeling laws like the DAIRY PRIDE Act and might still have successful opportunities to innovate, that will likely not be the case for smaller startup companies.<sup>166</sup> Considering that familiarity—particularly brand familiarity—is one of the most valuable assets of a company because it is so influential to the consumer's purchasing decision, startup companies are put at a

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<sup>160</sup> See Scott Goodson, *Why Brand Building is Important*, FORBES (May 27, 2012), <https://www.forbes.com/sites/marketshare/2012/05/27/why-brand-building-is-important/#729a6e9e3006> (“Branding is fundamental. Branding is basic. Branding is essential. Building brands builds incredible value for companies and corporations.”).

<sup>161</sup> *Understanding the Power of a Brand Name*, NIELSEN (July 6, 2015), <https://www.nielsen.com/us/en/insights/article/2015/understanding-the-power-of-a-brand-name/>. The Nielsen Product Innovation Survey polled over 30,000 consumers across sixty countries. *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See *id.*; FULLER, *supra* note 135, at 6.

<sup>164</sup> *Understanding the Power of a Brand Name*, *supra* note 161.

<sup>165</sup> See *Global Consumers More Likely to Buy New Products from Familiar Brands*, NIELSEN (Jan. 23, 2013), <https://www.nielsen.com/ie/en/press-releases/2013/global-consumers-more-likely-to-buy-new-products-from-familiar-b0/> (discussing the proportion of people who prefer new products from brands familiar to them).

<sup>166</sup> *Understanding the Power of a Brand Name*, *supra* note 161 (“[B]ecause brand building can be costly and time consuming, it can be extremely advantageous for established brands to lend their name to a new item in the same category through line extensions.”).

disadvantage over established brands when introducing innovative products into the market.<sup>167</sup>

Startup companies are known to be inherently riskier than established companies.<sup>168</sup> Over 627,000 startups companies—as Impossible Foods was back in 2011—launch each year in the United States.<sup>169</sup> According to the Small Business Association, of those half a million startups, only fifty-one percent survive past the five-year mark.<sup>170</sup> A study conducted by CB Insights examined the factors contributing to this high failure rate.<sup>171</sup> They interviewed 156 startup founders to determine what had caused their companies to fail and sorted these reasons into twenty different categories, ranging from loss of focus to a lack of business model.<sup>172</sup> CB Insights found that “running out of cash” was ranked as the second most prevalent reason for startup failure.<sup>173</sup>

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<sup>167</sup> *See id.*

<sup>168</sup> *See id.* (“[I]t can be extremely advantageous for established brands to lend their name to a new item in the same category through line extension.”); *see also* Zak Slayback, *You’re Young: Work at a Startup or an Established Company?*, ZAK SLAYBACK, <https://zakslayback.com/take-job-startup-established-company-youre-young/> (last visited Jan. 10, 2020) (“Startups are, like anything that hasn’t been done before, particularly risky ventures. It’s possible that you could spend months of your life building a product that doesn’t garner any customers, or you go for a year and fail to raise a seed round that you need to keep operating and have to close the doors.”).

<sup>169</sup> *See* Louise Balle, *Information on Small Business Startups*, CHRON, <https://smallbusiness.chron.com/information-small-business-startups-2491.html> (last visited Feb. 15, 2020) (discussing that while 627,000 new businesses open each year, 595,000 business close each year)

<sup>170</sup> *Id.*; *see also* Bill Clark, *Startups are Risky...But just how Risky?*, MICROVENTURES (Aug. 3, 2017), <https://microventures.com/startups-are-risky-but-just-how-risky> (“According to the U.S. Bureau of Labor Statistics, fifty percent of all new businesses survive for at least five years and thirty percent make it to their tenth year. For small businesses in particular, perhaps most similar to the standard definition of “startup,” about twenty percent will fail by the first year and fifty percent will fail by the fifth year.”).

<sup>171</sup> Vic Lance, *Top 20 Reasons why Startups Fail*, FORBES (Mar. 2, 2016), <https://www.forbes.com/sites/groupthink/2016/03/02/top-20-reasons-why-startups-fail-infographic/#63741d503911>.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* (discussing that twenty-nine percent of startup companies fail because they run out of cash); *see also* Bill Clark, *supra* note 147; *see also* David Skok, *5 Reasons Startups Fail*, FOR ENTREPRENEURS, <https://www.forentrepreneurs.com/why-startups-fail/> (last visited Jan. 7, 2020) (listing “running out of cash” as one of the top five reasons startup companies fail). Another study examined 193 failed startup companies and determined that running out cash was the second most common reason startup companies fail. *See Decoding*

Moreover, building a brand to the point of forging consumer recognition and confidence can be costly and time consuming.<sup>174</sup> On average, developing a brand in today's competitive market can cost anywhere between \$10,000 and \$500,000 at the outset.<sup>175</sup> In fact, it is recommended that brand development constitute twelve to fifteen percent of the startup company's initial investment.<sup>176</sup>

In light of the high costs associated with research and development,<sup>177</sup> the inherent risk of startup companies,<sup>178</sup> and the potential cost of educating the consumer about an innovative product's added value,<sup>179</sup> startups might be discouraged to invest in, and launch, innovative products.<sup>180</sup> This, in turn, gives established companies an advantage over startup companies.<sup>181</sup>

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*Startup Failure: Why 193 Failed Startups Didn't Survive*, FRAC TL, <https://www.frac.tl/work/marketing-research/why-startups-fail-study/> (last visited Jan. 8, 2020) ("Cash is king for startups. Even a successful business model will fail without proper cash flow."); see also Leigh Buchanan, *American Entrepreneurship is Actually Vanishing. Here's Why*, INC. (May 2015), <https://www.inc.com/magazine/201505/leigh-buchanan/the-vanishing-startups-in-decline.html> ("In his book *Where the Jobs Are: Entrepreneurship and the Soul of the American Economy*, Dearie and his co-author interviewed more than 200 founders about the challenges of building businesses. Their subjects cited five: insufficient access to capital; difficulty finding people with the right skills; immigration policies that keep talent out; onerous taxes and regulations; and economic uncertainty.").

<sup>174</sup> *Understanding the Power of a Brand Name*, supra note 161; see also Jim Judy, *6 Reasons Why Startups Are Riskier Than Franchise Businesses*, ENTREPRENEUR (Oct. 16, 2018), <https://www.entrepreneur.com/article/321095> ("Building brand identity is difficult and time-consuming, often taking years to establish. Most business owners lack the time and resources to spend years building up a brand from scratch, so they fail to grow outside their immediate circle of influence, or just plain fail.").

<sup>175</sup> Joshua Claflin, *How Much Does a Brand Cost to Build?*, GARRISON EVEREST (Sept. 22, 2019), <https://www.garrisoneverest.com/brand-development-2/how-much-does-a-brand-cost-to-build/>.

<sup>176</sup> *Id.*

<sup>177</sup> See supra note 152 and accompanying text.

<sup>178</sup> See supra note 168 and accompanying text.

<sup>179</sup> See supra note 135 and accompanying text.

<sup>180</sup> See Buchanan, supra note 173 ("We celebrate enduring businesses for good reason. But to the extent they crowd out newcomers, innovation takes a hit. 'The major innovations of the past century and a half—the telegraph, the automobile, refrigeration, air conditioning, computers—they all came from entrepreneurs,' says Dearie [author of *Where the Jobs Are: Entrepreneurship and the Soul of the American Economy*].").

<sup>181</sup> See *id.* ("Established businesses have always held the edge, and the larger those businesses become, the fewer the [sic] startups that sprout.").

Innovation is considered, by some, to be more difficult for established companies than it is for startups because of their more complex business structures and product portfolios.<sup>182</sup> Despite it being logistically easier for startups companies, “nobody is more likely to succeed in their innovation efforts” than established companies are.<sup>183</sup> In explaining why established companies have an advantage over startups, Kris Østergaard, an expert on innovation in established companies, noted that “[u]nlike startups, established organizations have tremendous resources. They have money, customers, data, employees, suppliers, partners, and infrastructure—which put them in a perfect position to transform new ideas into concrete, value-creating, successful offerings.”<sup>184</sup> Nielsen commented on the issue and noted:

[B]ecause brand building can be costly and time consuming, it can be extremely advantageous for established brands to lend their name to a new item in the same category through line extensions. In fact, line extensions are approximately three to four times more common than “new manufacturer” and “new brand” launches combined.<sup>185</sup>

This is not without consequence. As Michele Simon, Executive Director of the Plant Based Foods Association noted, “[the DAIRY PRIDE Act] would declare the free market dead with the promotion of protectionist policies pushed by dairy-state politicians and their lobbyists.”<sup>186</sup> The advantage that larger, established companies already have over smaller, startup companies when introducing

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<sup>182</sup> Kris Østergaard, *How Innovation is Completely Different in Established Organizations than in Startups*, LEADERSHIPNOW (July 25, 2019), [https://www.leadershipnow.com/leadingblog/2019/07/how\\_innovation\\_is\\_completely\\_d.html](https://www.leadershipnow.com/leadingblog/2019/07/how_innovation_is_completely_d.html) (discussing that it is easier for startup companies to innovate because they typically focus on one product and then scale up); see also Karyl Scott, *When it Comes to Innovation, Startups and Big Companies Share Common Approaches*, BUS. PERFORMANCE INNOVATION, [http://www.bpinetwork.org/thought-leadership/views-commentary/375/when\\_it\\_comes\\_to\\_innovation\\_startups\\_and\\_big\\_companies\\_share\\_some\\_common\\_approaches](http://www.bpinetwork.org/thought-leadership/views-commentary/375/when_it_comes_to_innovation_startups_and_big_companies_share_some_common_approaches) (last visited on Feb. 16, 2020) (“Startups, by their very nature, are innovative. Larger, more established companies have to work harder to foster a culture that encourages innovation.”).

<sup>183</sup> Østergaard, *supra* note 182.

<sup>184</sup> *Id.*

<sup>185</sup> *Understanding the Power of a Brand Name*, *supra* note 161; see also Aisle be Seeing You: *Why Retail Placement is so Important to Plant-Based Substitutes*, *supra* note 148 (discussing that Tyson, a large and established company that initially only focused on selling meat products, is now innovating by entering the plant-based market).

<sup>186</sup> See Simon, *supra* note 81.

innovative products into the market would be exacerbated if bills like the DAIRY PRIDE Act are enacted. If a startup is seeking to introduce an innovate product into an-already saturated and competitive market, the costs and risks associated with developing a brand to the point of consumer recognition, simply to introduce the innovative product down the line, might not be worth it.

#### IV. ALTERNATIVE SUGGESTIONS

Proponents of the DAIRY PRIDE Act argue that the current labeling practices of plant-based corporations—in which plant-based alternatives to dairy and meat products contain words such as “milk” and “cheese” on their packaging—are deceiving.<sup>187</sup> They claim that the misbranding of these products misleads consumers into thinking the products contain animal products, which is in turn, hurting the dairy industry.<sup>188</sup> As examined above, restrictive labeling practices like the DAIRY PRIDE Act is unlikely to significantly impact the plant-based industry as it exists today.<sup>189</sup> However, if the DAIRY PRIDE Act were to pass into law—essentially enabling an entire industry to appropriate a generic word—the future of product innovation, both in the food industry and in other sectors, could be severely impacted.<sup>190</sup>

To avoid any of those risks, the dairy and plant-based industries could compromise on a terminology for plant-based products. Just as Hampton Creek was able to come to an agreement with the FDA whereby the company committed to changing the use of the term ‘mayo’ on its labels to ensure that its products were labeled truthfully,<sup>191</sup> a proposed solution would be for plant-based corporations to negotiate similar deals with the federal agency. As suggested by the Plant-Based Foods Association, whose wish it is to create standards for universal terminology, plant-based products would be allowed to use the term “milk” following the main ingredient in the product—such as “oat milk” or “almond cheese”—or simply be labeled “plant-based milk.”<sup>192</sup> The labels of plant-based products would further “include clear disclosure of the main ingredient in addition to including the terms like ‘dairy-free’ or ‘non-dairy’ on the

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<sup>187</sup> See *supra* notes 28, 69 and accompanying text.

<sup>188</sup> See *supra* notes 28, 69, 76, 79, 188 and accompanying text.

<sup>189</sup> See *supra* note 93 and accompanying text.

<sup>190</sup> See *supra* notes 167 and accompanying text.

<sup>191</sup> See *supra* note 70 and accompanying text.

<sup>192</sup> Sipple, *supra* note 20.

principal display panel.”<sup>193</sup> Adding such qualifiers, even if they include the word “dairy,” is not prohibited by the current version of the DAIRY PRIDE Act. In fact, the Act simply prohibits a product from using a market name for a dairy product if it does not meet the criterion set forth by the FDA for a “dairy product.”<sup>194</sup>

Similarly, others have suggested adopting uniform labeling standard for plant-based products, including qualifiers such as “vegan” or “made from plants.”<sup>195</sup> Adding qualifiers clearly displaying that a product is derived from plants or is “dairy-free” alone will not entirely solve the conflict between the dairy and plant-based industries. As explained above, consumers are not confused about whether plant-based products are derived from animals.<sup>196</sup> Moreover, as the DAIRY PRIDE Act mentions, the proponents’ main concern is a health one; they fear that consumers perceive plant-based products as being healthier than animal products.<sup>197</sup> While plant-based products are not purporting to derive from animals or contain the same nutrients as animal-derived products, a sounder compromise would be for plant-based products to clearly display the amount of vitamin D, calcium, potassium, and protein contained in each product. Adopting more transparent measures, such as this one, is an effective way of building trust and loyalty with consumers.<sup>198</sup> It would also appease the FDA’s main concern about consumers being “misled” into believing plant-based products are more nutritious than animal-derived products, because it would let consumers make more informed decisions about the foods they choose to purchase.<sup>199</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> See DAIRY PRIDE Act, S. 792, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/792/text?q=%7B%22search%22%3A%5B%22dairy+pride+act%22%5D%7D&r=1&s=1>.

<sup>195</sup> Kristin Toussaint, *Plant-Based Foods Agree on Labeling Standards to Help Fight Attacks from the Meat Industry*, FAST COMPANY (Dec. 11, 2019), <https://www.fastcompany.com/90441515/plant-based-foods-agree-on-labeling-standards-to-help-fight-attacks-from-the-meat-industry>.

<sup>196</sup> See *supra* note 81 and accompanying text.

<sup>197</sup> See DAIRY PRIDE Act, S. 792, 116th Cong. (1st Sess. 2019), <https://www.congress.gov/bill/116th-congress/senate-bill/792/text?q=%7B%22search%22%3A%5B%22dairy+pride+act%22%5D%7D&r=1&s=1>.

<sup>198</sup> Mary-Ellen Shoup, *How Are Consumers Thinking About Transparency? FMI and Label Insight Explain*, FOOD NAVIGATOR (Nov. 30, 2018), <https://www.foodnavigator-usa.com/Article/2018/11/30/How-are-consumers-thinking-about-transparency-FMI-and-Label-Insight-explain>.

<sup>199</sup> *Transparency in Food Labeling: Food Labels Inform Consumer Choices—and Industry Pushes Back*, UNION OF CONCERNED SCIENTISTS (July 19, 2016), <https://www.ucsusa.org/resources/transparency-food-labeling>.

Although there is a possibility that these types of transparent labeling measures could negatively affect the plant-based industry, it seems unlikely. As explained previously, the majority of people who consume plant-based products are purposefully seeking out those alternatives to animal products for a variety of reasons, including lactose intolerance or veganism.<sup>200</sup> This suggests that more transparent nutritional packaging displays—even ones indicating that a serving of almond milk will have less protein and calcium than that of cow's milk—will likely not impact those consumers' habits. Additionally, previous transparent labeling practices, such as labeling standards for genetically modified foods (GMOs), have not impacted product sales.<sup>201</sup> On the contrary, consumers have appreciated being more informed about the products they were purchasing.<sup>202</sup> Researchers have gone so far as to hypothesize that such labeling will actually have a positive effect in the marketplace in the long run because it will encourage competition.<sup>203</sup> Unlike the GMO labels which sought to make the origin of ingredients more transparent to consumers, this proposed plant-based label would only clear up some potential misconceptions about the nutritional value of plant-based products. This further suggests that labels clearly displaying how much calcium or protein is contained in a plant-based product will likely not affect sales in a negative way. On the contrary, some dairy milk alternatives—particularly pea milk—are known to contain similar amounts of protein, calcium, potassium, and vitamin D to cow's milk.<sup>204</sup> In light of the current pace of product innovation, additional plant-based products with more nutritional value than cow's milk

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<sup>200</sup> See *supra* note 82 and accompanying text.

<sup>201</sup> Ken Roseboro, *Food Companies Say GMO Labels Having No Impact on Product Sales*, ORGANIC CONSUMERS ASS'N (Sept. 28, 2017), <https://www.organicconsumers.org/news/food-companies-say-gmo-labels-having-no-impact-product-sales>; see also Sarah Zhang, *Does GMO Labeling Actually Increase Support for GMOs?*, ATLANTIC (June 27, 2018), <https://www.theatlantic.com/science/archive/2018/06/gmo-labeling-study/563699/>.

<sup>202</sup> See Zhang, *supra* note 201.

<sup>203</sup> See Roseboro, *supra* note 201 (“My hypothesis is that what labeling is going to do is to stop this whole debate because people who want the information and are going to use it will have choice in the marketplace and people who don't care are going to go on their happy business. We will have a competitive marketplace where consumers will decide and their desires will be met by a variety of offerings.”).

<sup>204</sup> See RIPPLE FOODS, <https://www.ripplefoods.com> (last visited Mar. 8, 2020); see also Sarah Schlichter, *A Nutritional Comparison of Dairy and Plant-Based Milk Varieties*, MY FITNESS PAL (Aug. 7, 2018), <https://blog.myfitnesspal.com/a-nutritional-comparison-of-dairy-and-plant-based-milk-varieties/>.



could exist at some point in the future, in which case the plant-based industry would benefit from such transparent labels.

In the event the DAIRY PRIDE Act is enacted into law, one way to continue growth is to, for a while, prioritize collective messaging over individual brand marketing. This collective effort would put forward the value of alternative choices. Joint marketing efforts, usually provided by trade associations,<sup>205</sup> are already common both in the plant-based food industry and in many others.<sup>206</sup> Even milk producers do it regularly.<sup>207</sup> The difference would be in the amount spent and effort made. For a time following the passage of the DAIRY PRIDE Act, the plant-based industry would join forces to put forward a louder campaign in favor of its members. In tandem, the industry, also collectively, could invest in the research and development of new market segments to strengthen the sector as a whole. Rather than just copy existing product segments, it would be an opportunity for the plant-based industry to innovate and create an entirely new segment, but to initially do so as a collective. Lastly, in a post-DAIRY PRIDE Act scenario, the plant-based industry could focus on “Tabasco-style marriages.” Tabasco was very successful in its alliance with other food types. Tabasco potato chips or even mayonnaise allowed the brand to benefit from others’ marketing.<sup>208</sup> Similarly, the plant-based industry could increase its focus on prepared foods such as pizza, lasagna, or cake mixes. By encouraging prepared foods manufacturers to adopt even more plant-based alternative ingredients, they could increase both the sale of the prepared item and the recognition of its plant-based ingredients.

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<sup>205</sup> See Howard E. Aldrich, *Trade Associations Matter as Units of Selection, as Actors Within Comparative and Historical Institutional Frameworks, and as Potential Impediments to Societal Wide Collective Action*, 27 J. MGMT. INQUIRY 21 (2018) (“Trade associations focus their members’ attention on collective interests, creating shared understandings about issues and a collective identity that unified an association and justified calls for action by the association on the members’ behalf.”).

<sup>206</sup> See e.g., *Food and Beverage Industry Trade Associations*, FOOD INDUS. EXEC., <https://foodindustryexecutive.com/food-and-beverage-industry-trade-associations/> (last visited Mar. 8, 2020).

<sup>207</sup> See *Cooperatives in the Dairy Industry*, U.S. DEP’T AGRIC., <https://www.rd.usda.gov/sites/default/files/cir1-16.pdf> (last visited Mar. 8, 2020).

<sup>208</sup> See *Utz Spicy & Wavy Tabasco Potato Chips*, TAQUITOS, <https://www.taquitos.net/chips/Utz-Spicy-Wavy-Tabasco> (last visited Mar. 8, 2020); see also Samantha Loveday, *Hellmann’s Heats Up with Tabasco Partnership*, LICENSING SOURCE (Aug. 2, 2018), <https://www.licensingsource.net/hellmanns-heats-up-with-tabasco-partnership/>.

Finally, in light of a growing number of consumers choosing to adopt a plant-based lifestyle or simply choosing to reduce the amount of dairy or other animal products they consume, as well as society generally moving towards a more sustainable future, the FDA should modernize food standards of identity and amend its current guidelines to allow plant-based products to use terms like “milk” and “cheese.”<sup>209</sup> Susan Mayne, the Director for FDA Center for Food Safety and Applied Nutrition, noted that “many standards [of identity] were established decades ago and have not been recently amended to reflect changes in consumer expectations or opportunities for innovation, including the ability to produce healthier foods.”<sup>210</sup> While standards of identity are important to protect the consumer, allowing for more flexibility and leniency in FDA regulations would promote innovation.<sup>211</sup> As some have suggested, one solution would be to adopt a “horizontal approach,” enabling changes to be made across different categories of standardized foods.<sup>212</sup> The lack of clarity in the current standards of identity has resulted in states defining product categories at the state-level—as discussed above with Missouri and Mississippi—which, in turn, has led to “patchwork regulation,” further confusing consumers.<sup>213</sup> In modernizing current standards of identity, reflective of consumer demands, the FDA would not only enhance consumer trust, but also encourage companies to develop new products.<sup>214</sup>

## V. CONCLUSION

For decades, consumers around the world have increasingly chosen to incorporate plant-based alternatives to animal products into their diets. This choice has blossomed into a now-well-established lifestyle, usually referred to as vegan or plant-based. In response to this growing movement, plant-based alternatives have multiplied and, in some cases, become mainstream products. To better position and reassure the consumer, the plant-based industry has opted to use terms

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<sup>209</sup> See Nigel Barrella, *Petition to Recognize the Use of Well-Established Common and Usual Compound Nomenclatures for Food*, GOOD FOOD INST. (Mar. 2, 2017), <https://www.gfi.org/images/uploads/2017/03/GFIpetitionFinal.pdf>; see also Lillianna Byington, *How Should the FDA Modernize Food Standards of Identity*, FOOD DIVE (Sept. 30, 2019), <https://www.fooddive.com/news/fda-modernize-food-standards-of-identity/563935/>.

<sup>210</sup> Byington, *supra* note 209.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

already familiar to consumers, such as “milk” or “meat,” to convey that a product can be used as a substitute to an existing product category. Courts have often weighed in on the side of plant-based companies arguing that both dairy and non-dairy consumers are comfortable with these naming conventions and will continue their purchasing habits without confusion despite the borrowed terminology. Nonetheless, some legislators, who are supported or perhaps spurred on by Big Dairy, argue the opposite: that there is confusion, and even a health risk. Unfortunately, consumers are not the only ones affected by regulatory shifts. If passed, this Act could have consequences that reach far beyond a “word war” between the dairy and plant-based industries. It is likely that companies, particularly startups, working in the plant-based economy will choose to reduce their research and innovation fearing the much higher cost of introducing both new products and new market segments.

