THE GOOD FOOD FIGHT FOR GOOD SAMARITANS:
THE HISTORY OF ALLEVIATING LIABILITY AND
EQUALIZING TAX INCENTIVES FOR FOOD
DONORS

Stacey H. Van Zuiden*

I. INTRODUCTION TO EXCESS FOOD DONATION

“Hunger should have no place at our table,”¹ but as long as it is present in
American homes, hunger should have a place in our conversations. As recent
food scarcity trends indicate, Americans have plenty to talk about. When the
conversation turns to action, Americans should appreciate that there is a realistic
and effective starting place within the proven framework of America’s existing
network of food charities. Today, key legislation, which would equalize tax in-
centives for all food donors continues to stall in Congress, jeopardizing food
donation by many commendable Good Samaritans.²

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* J.D., Drake University Law School, 2012.
1. BILL AYRES ET AL., NAT’L ANTI-HUNGER ORGS., A BLUEPRINT TO END HUNGER
2. See Good Samaritan Hunger Relief Tax Incentive Extension Act of 2011, S. 166,
112th Cong. § 2 (2011) (read twice and referred to Comm. on Fin.); Good Samaritan Hunger Relief

I. INTRODUCTION TO EXCESS FOOD DONATION

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This Note will explain the evolution of tort reform in the area of food donation; Part II of the Note will give a brief history of food donor liability in the United States and will draw conclusions about the reliability of state and federal law in the area of food donor immunity. What the analysis will reveal is that while food donors are encouraged to donate by a protective liability framework, more can be done to encourage all potential donors to give food to those in need. Therefore, Part III of the Note will focus on the history of tax incentives for food donors, including why enhanced tax incentives for food donations should be permanently expanded beyond a limited class of corporations (C corporations). Part III will also discuss the status of current tax legislation. Part IV offers the conclusion that, because liability is likely no longer an obstacle, equalizing tax incentives is the best way to increase food donations during extraordinary times of need.

First, it is important to understand the need involved. Feeding America, the United States’ leading domestic hunger-relief charity, estimates that in 2009 their network of over 200 food pantries, kitchens, and shelters served 37 million different people. The organization noted sizeable increases in the number of unduplicated clients served weekly from 2005 to 2009. While the noticeable increase is largely due to the most recent global recession, the need for emergency food relief has been a recognized problem since Feeding America’s inception in 1967 as the first food bank in the country.

Feeding America’s founder, John van Hengel, who passed away in 2005, started the organization in Phoenix, Arizona with a truckload of gleaned produce from nearby farms and citrus groves. Over time, the organization grew into a network of food pantries, kitchens, and shelters that distribute food donations and leftovers. Eventually, this network was incorporated as “America’s Second
Harvest,’ presently known as ‘Feeding America.’ Both names will be used interchangeably in this Note.9

Today, Feeding America is a remarkable and respected advocate for ending the problem of hunger in the United States.10 Their work, along with the efforts of thousands of other local and national emergency food providers, alleviates food scarcity for millions of Americans.11 And while millions of people rely on them, they in-turn rely on private food donations and ongoing food recovery efforts (the process of collecting and redistributing excess food or leftovers) from Good Samaritans.12 But even with extraordinary generosity from food producers, food chains, companies, and individuals, a 2010 Feeding America study indicated that 24.8% of pantries, 11.8% of kitchens, and 10.1% of shelters in their network “sometimes or always [had] to stretch food resources.”13 As a result, a substantial number of programs “found it necessary, either sometimes or always, to reduce meal portions or reduce the quality of food in food packages because of lack of food.”14 What these figures do not reveal, but should be more readily apparent to most Americans, is that the food resources exist to close this gap.15

In the 1990s, a USDA study revealed that about a quarter of food produced in the U.S.—approximately 96 billion pounds of food—goes to waste an-

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8. Id.
11. MABLI ET AL., supra note 3, at 43.
14. Id. at 279.
This waste happens “in fields, commercial kitchens, manufacturing plants, markets, schools, and restaurants.”

While public and private food waste awareness over the past two decades has likely led to better production, efficiency, and increased participation in food recovery efforts, there is still a vast amount of food not going to use. For this reason, it is critical that public policies reflect our collective interest and commitment to move excess food resources to those who could truly reap the benefits.

As mentioned, this Note will demonstrate that there are policies that enhance the proven framework of these charitable organizations in their fight for a practical solution to hunger. Therefore, one must first consider why a farmer, manufacturer, school, plant, or restaurant might be reluctant to donating excess food to a local shelter or food bank. Two likely answers are that there are risks and there are certainly costs for the potential donor. While lawmakers have successfully mitigated the civil and criminal liabilities of donating, they have been less proactive in ensuring that donating is fiscally possible for all potential food donors. Furthermore, the history of excess food donation legislation may shed light on why some reforms have been successful while others continue to fail.

II. HISTORY OF EXCESS FOOD DONATION AND DONOR LIABILITY

Excess food donation was not always as complicated as it is today. In the formative years of Feeding America, van Hengel’s success was credited to

16. Kantor et al., supra note 15, at 3, 4 fig.2.
18. See id.
19. See H.R. Rep. No. 104-661, at 3 (1996) (quoting Christina Vladimiroff, President and CEO of the Second Harvest National Food Bank Network as saying, “Our experience is clear. There are companies that want to donate food and grocery products, but are fearful of contributing because of the varying state laws regarding their liability for what would otherwise be a generous act of donation.”); see also Encouraging Charitable Giving: Hearing Before the S. Comm. on Fin., 107th Cong. 2–3 (2001) [hereinafter Encouraging Charitable Giving] (statement of Sen. Richard Lugar) (“In many ways, the current tax law is a hindrance to food donations. The Tax Code provides corporations with a special deduction for donations to food banks, but it excludes farmers, ranchers, and restaurant owners from donating food using the same tax incentive”).
his simple ability to convince corporations to donate their excess food instead of
throwing it away.21 He assured donors that their food would be handled safely
and that it would not be resold for profit.22 Unfortunately, the process became
convoluted as the potential for lawsuits and the costs of donating increased, caus-
ing many in the agricultural community and food industry to weigh the benefits
and risks of donating or dumping their food.23

Initially, lawmakers reacted to donor uncertainty by removing obstacles
for potential donors and even encouraging donating.24 Tort liability and tax in-
centives are two identifiable areas where this reform occurred.25 Today, tort li-
ability in the area of food donation is likely at its apex, allowing donors to benefit
from what is recognized as the maximum protection they will receive. Efforts to
permanently reform tax incentives for all food donors, however, have stalled in
Congress, and will continue to fall between cracks without a better apprecia-
tion of the costs associated with donating excess food.26 There is good news, how-
ever. The opportunity for change exists and traditionally has had bipartisan Con-
gressional support; obstacles appear to be a combination of timing and the federal
budget.27

A. Removing Liability for Food Donors

In the history of food donation reform, one of the first steps taken to en-
courage donating was protecting donors from liability. States were the first to
experiment with what have become known as “Good Samaritan” food donation
laws.28 These laws were passed to alleviate donor concerns of company or per-

21. See Sullivan, supra note 5.
22. Id.
23. See H.R. Rep. No. 104-661, at 3; Encouraging Charitable Giving, supra note 19, at
2–3 (statement of Sen. Richard G. Lugar expressing that for many of these businesses it would be
more cost-effective to dump their food).
58509 (West 1997 & Supp. 2012)) (California was the first state to pass a law relieving food donors
2010).
26. See, e.g., Good Samaritan Hunger Relief Tax Incentive Extension Act of 2011, S.
to the Committee on Finance).
27. See, e.g., Good Samaritan Hunger Relief Tax Incentive Act, S. 37, 107th Cong.
sonal liability for injuries caused by donated food. Good Samaritan laws limited liability rather than requiring strict liability, the standard traditionally used in defective product cases.

California was the first state to enact legislation of this type. In 1977, California State Senator John A. Nejedly sponsored a Bill to remove donor liability after he spoke with local grocery stores about their propensity to dump food rather than donate it. In testimony before the California Senate Committee on Agriculture and Water Resources, Paul Growald, director of the Food Bank in Santa Clara County, stated that canning companies feared exposure to liability for injuries incurred if the food was mishandled. The Bill eventually introduced by Nejedly in the California Senate (S.B. 199) relieved all liability for food donors, but did not reduce liability for food banks or other recipient organizations. As the Bill moved through various committees, questions and concerns were voiced about placing all of the responsibility onto non-profits; whether people who used emergency food resources should be encouraged to eat lower-quality food; and whether the benefit of feeding the hungry outweighed the right to sue for an injury. Ultimately, California lawmakers determined that the benefits of feeding hungry families overcame any potential harm. Although, as a final compromise, the Bill was amended to allow for donor liability if there was “gross


30. H.R. REP. NO. 104-661, at 2 (discussing the policy of all fifty states to generally hold distributors of food or other defective products strictly liable); Morenoff, supra note 28, at 107–08.
32. Morenoff, supra note 28, at 109 (citing Telephone Interview with John Nejedly, Former California State Senator (Feb. 22, 2001)).
33. Morenoff, supra note 28, at 110 (citing Testimony in Support of S.B. 199 Presented to the Cal. S. Comm. on Agric. & Water Res. (Cal. 1977) (statement of Paul Growald)).
35. See Morenoff, supra note 28, at 110–11.
36. 1977 Cal. Stat. 2949 (codified at FOOD & AGRIC. §§ 58501–58509) (the bill’s passage signified that the benefits outweigh its harms); see Morenoff, supra note 28, at 111.
negligence” or “willful acts” on the donor’s part. With this last amendment adopted, the Bill passed the assembly with unanimous support.

Over the next decade, all fifty states adopted Good Samaritan food donation laws in one form or another. States varied, however, in their treatment of liability for organizations, as well as the standard to which a donor would be held liable—for “gross negligence or willful acts” or “gross negligence, recklessness or intentional conduct,” or some other basis. There were also variations of the term “donated goods.” Inconsistency in state law made donating exceedingly complicated for multistate corporations and threatened to impede donative behavior. This led interested parties, including America’s Second Harvest, to Capitol Hill, where they hoped to find another sympathetic lawmaker. The vision was that legal uniformity in liability law would give donors confidence that they could make donations in multiple states and not encounter a host of legal problems.

The Bill Emerson Good Samaritan Food Donation Act of 1996 accomplished uniform protection for well-intentioned food donors both on paper and, in all likelihood, in the courtroom. While this federal Bill had been preceded by the Model Good Samaritan Food Donation Act, which was included in the National and Community Service Act of 1990, the Emerson Act was the first piece of congressional legislation that did more than merely encourage states to adopt
uniform donor protection standards. The Emerson Act was introduced as H.R. 2428 in 1995 by Representative Pat Danner (D-MO), who was, at the time, a junior member of her state’s delegation. Because Republicans had just taken control of the House, Danner, a Democrat in her first term in Congress, would not likely have had an opportunity to push through any legislation on her own. Thankfully for Danner, one of her senior colleagues from Missouri, Representative Bill Emerson—a Republican—became a Bill co-sponsor.

Rep. Emerson had been a long-time advocate for hunger issues in the United States and had sponsored anti-hunger bills such as the Temporary Emergency Food Assistance Act of 1983. He had also held leadership positions on the House Agricultural Committee, the House Select Committee on Hunger, and the Congressional Hunger Center. Today, his influence (as evidenced by the Act’s title) is seen as the driving force behind the Bill’s success.

In May 1996, both Danner and Emerson testified (although Emerson submitted written comments because he was undergoing cancer treatments at the time) that removing liability for willing donors would facilitate increased participation of the private sector in emergency food programs across the country. Christine Vladimiroff, then-CEO of America’s Second Harvest, also testified before Congress regarding the need for private charity in alleviating America’s food insecurity problem.

A few months later, the Economic and Educational Opportunities Committee passed the Bill out of committee by voice vote after renaming the Act in Rep. Emerson’s honor, as the Representative lost his battle with cancer in June

48. Morenoff, supra note 28, at 121 (noting the political climate with Republican majorities in the House and Senate, as well as Rep. Danner’s lack of clout as a junior member); Cohen, supra note 41, at 472.
50. Cohen, supra note 41, at 472.
51. Id.
52. See H.R. Rep. No. 104-661, at 4 (1996) (stating Rep. Emerson had worked “very hard to have this bill actively considered . . . and it is a fitting tribute that this Act be named in his honor.”).
1996.\textsuperscript{55} Bolstered by a bipartisan desire to pay tribute to the late Rep. Emerson, the Bill met minimal friction on the House floor, where it was also passed by voice vote.\textsuperscript{56}

In the Senate, Sen. Christopher Bond (R-MO) introduced a companion Bill, which encountered some resistance from Democrats, who voiced concerns on behalf of the American Trial Lawyers Association.\textsuperscript{57} As a result, an Amendment was offered to modify the Bill’s definition of “gross negligence” to include the “failure to act,” and required that nothing in the Act supersede state and local health regulations.\textsuperscript{58} This final amendment appeared to placate the parties involved, thereby allowing the Senate to also pass the Bill by voice vote.\textsuperscript{59}

The Act, as passed by Congress and signed by former President Bill Clinton, protects good faith donors of apparently wholesome food and grocery products from civil and criminal liability in the event the product should harm a recipient.\textsuperscript{60} The Act specifically defines the term “apparently wholesome food” as “food that meets all quality and labeling standards imposed by Federal, State, and local laws and regulations even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.”\textsuperscript{61} The law has remained unchanged since the Act’s passage in 1996.\textsuperscript{62}

B. The Reliability & Constitutionality of the Bill Emerson Food Donation Act

Today, the Emerson Act remains a unique bipartisan victory and is often touted by both the private sector and the government as a reliable source of protection for donors.\textsuperscript{63} Food Donation Connection (FDC), an organization which “manages food donation programs for food service companies” confidently ad-
vises to their clients and the public, via their website, that the law protects “individuals, corporations, partnerships, organizations, associations, governmental entities, wholesalers, retailers, restaurateurs, caterers, farmers, gleaners, nonprofit agencies, and more.”\textsuperscript{64} The USDA and Feeding America have also featured the law in publicity materials with the hope that the Act would encourage new donations.\textsuperscript{65} Even the Environmental Protection Agency (EPA) highlights the Emerson Act on sections of their website devoted to reducing waste, with the obvious benefit to the EPA being a reduction in food occupying space in landfills.\textsuperscript{66} But despite the visible public relations utility of the Bill, the question remains if the law actually accomplished the increase in food donation anticipated by lawmakers.

Overall, there were some tangible indicators that the Bill stimulated additional donative behavior; America’s Second Harvest experienced an increase of 87 million pounds of food in the year following the passage of the Act.\textsuperscript{67} Also, Sodexo Management Service, a large food service management firm, announced it would increase its work with hunger organizations not long after the Act went into effect.\textsuperscript{68} Still, some would argue that it is impossible to determine if the Act had any impact on increasing the volume of donations because no known lawsuits of the type feared before the Act’s passage were filed.\textsuperscript{69}

The suggestion is that some in the private sector used a trumped-up fear of liability to avoid donating.\textsuperscript{70} Though, short of accusing companies of misleading Congress about donating reservations, any speculation of the actual need for


\textsuperscript{65} See USDA, A CITIZEN’S GUIDE TO FOOD RECOVERY 10 (1996); Protecting Our Food Partners, supra note 63; Food Rescue Program, SECOND HARVEST HEARTLAND, http://www.2harvest.org/site/pageserver?pagename=progserv_food_rescue (last visited May 1, 2012).


\textsuperscript{68} Morenoff, supra note 28, at 131; see also Sodexo’s STOP Hunger Initiative, SODEXO, http://www.sodexo.com/en/commitments/sustainable-development/local-communities/stop-hunger.aspx (last visited May 1, 2012). Sodexo’s STOP Hunger Initiative has been in place since late 1996. \textit{Id.} The initiative places particular emphasis on food donations to hunger relief organizations and food waste education. \textit{Id.}

\textsuperscript{69} Morenoff, supra note 28, at 131.

\textsuperscript{70} \textit{Id.} at 114 (discussing then-Oregon State Senator Gardner’s opposition to the Oregon Good Samaritan Food donation law because potential donors could look for other excuses not to donate).
the Emerson Act is fairly impractical. Real or imaginary, the excuse has been removed and Congress articulated a public policy of support for excess food donation and for the Good Samaritans donating. More serious and credible concerns about the Emerson Act relate to the pre-emption of state law, however, and perhaps even the Act’s unconstitutionality. These two concerns were succinctly raised by David L. Morenoff in his article, Lost Food and Liability: The Good Samaritan Food Donation Law Story. Morenoff explained that the first agency to take on the Emerson Act’s implementation was the USDA. In doing so, the Agency asked the Department of Justice (DOJ) for an opinion as to whether the Act pre-empted state law or merely set the liability floor. The DOJ concluded that the law, as written, was only a partial pre-emption of state law, meaning states could, at their choosing, set an even higher liability floor than the one in the Act. The DOJ stated “[w]e believe that the legislative history of the Act, together with its express purpose and the context in which it was enacted, indicate that Congress intended to establish a ‘uniform national law’ that displaces conflicting state [G]ood [S]amaritan statutes—i.e., those that provide less liability protection than federal law.” To date, no state has challenged this preemption interpretation and, as Morenoff points out, states are not likely to disturb the Emerson Act because of the benefits they derive from it.

Additionally, the constitutionality of this type of legislation is reinforced by a far-reaching interpretation of the Commerce Clause. Morenoff had suggested that the Emerson Act could be challenged as unconstitutional in light of Commerce Clause jurisprudence at the time of his article. He believed it was necessary to determine if constraints placed on Congress’ Commerce Clause

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72. Id.; Morenoff, supra note 28, at 126–28 (explaining the law did not specifically address whether law was meant to preempt state laws and if the law could be found unconstitutional for not referencing an enumerated power authorizing Congress to pass such legislation).
75. Memorandum from Dawn E. Johnsen for James S. Gilliand, supra note 74.
76. Id.
77. Morenoff, supra note 28, at 130–32 (discussing the public policy benefits surrounding these types of Good Samaritan laws).
78. U.S. Const. art. VIII, § 1, cl. 3; see, e.g., Wickard v. Filburn, 317 U.S. 111 (1942) (holding that the Commerce Clause can be extended to intrastate activities that affect interstate commerce).
power because *United States v. Lopez* would cast some doubt on the legal soundness of the Emerson Act. In *Lopez*, the U.S. Supreme Court struck down a regulation of handguns in school zones, noting that this conduct had only a tenuous connection to interstate commerce and therefore fell outside the scope of federal Commerce Clause authority. Morenoff suggested that “[a]lthough selling food would fit comfortably within the Court’s precedents in this area, distributing food to people who cannot afford to purchase it may or may not fall under the Commerce Clause.”

The most compelling modern example of how excess food donation can “substantially affect interstate commerce” was not quite on the horizon when Morenoff wrote his article in 2002. Unfortunately, he could have predicted neither the Great Recession of the late 2000s nor what economic hardship would reveal about communities and their reliance on emergency food services. The Great Recession emphasized what we have probably always known—during economic hardship, families may have to choose between paying bills and putting food on the table. Businesses will also curb the amount of goods they carry or produce to adjust to the decrease in demand, so there is less excess food to donate. Therefore, if limiting donor liability encourages food donation and provides relief for a community’s food scarcity needs, then the Emerson Act is a mechanism for keeping local economies afloat.

If one considers much of the anecdotal evidence of present-day recession-worn America, one could effectively argue that encouraging excess food donation meets the threshold test of *Lopez* as substantially affecting interstate commerce. A court today would not isolate the Emerson Act from its practical effects, drawing from Commerce Clause analysis more akin to *Wickard v. Filburn* than *Lopez*. Furthermore, *Gonzales v. Raich* (the 2005 U.S. Supreme Court case upholding the federal criminalization of medicinal marijuana harvest-

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82. *Id.*

83. *Id.* at 129.

84. See *supra* Part I.

85. See *Lopez*, 514 U.S. at 559 (stating that whether the activity is within Congress’s power to regulate under the Commerce Clause is whether the activity “substantially affects” interstate commerce).


87. *Lopez*, 514 U.S. at 558–60 (invalidating a federal law which made it a federal crime to knowingly possess a firearm in a school zone, based on the finding that the law exceeded Congress’s Commerce Clause powers because it was not an economic activity that substantially affected interstate commerce).
ing) relied heavily on and affirmed the older *Wickard* standard.\(^8^8\) This confirmed that a broad and powerful Commerce Clause reading is very much alive and functioning today.\(^8^9\)

In *Raich*, the Supreme Court articulated that the federally regulated activity did not necessarily have to be “commercial” to substantially affect interest commerce, but instead the Court took into account the aggregate effect of the activity on markets and the economy.\(^9^0\) The aforementioned reasons explain why excess food donation bears a stronger relationship to the economy than carrying a gun onto school grounds,\(^9^1\) and therefore would more likely find support for constitutional validation under *Raich*.\(^9^2\)

It is worth mentioning that Morenoff was not quick to conclude that the Act would automatically be invalidated simply because there is a question about its constitutionality.\(^9^3\) In fact (to the contrary) he believed that the great weight of public policy was on the side of donor immunity.\(^9^4\) He felt that it was likely that the Emerson Act was ensconced in positive social reinforcement and therefore trustworthy for donors.\(^9^5\) This way of thinking still holds true today; donors can rest assured that a court would mostly likely find that Congress had the right to enact this type of preemptive legislation for donor liability and their “good acts” are indeed protected.

### III. Tax Incentives for Food Donors

As discussed, donors experience the widest possible latitude of relief from liability; meaning state governments are not going to punish them for committing a tort if they were acting in good faith.\(^9^6\) That does not mean that donors will not face long-lasting negative publicity, however, if their donated food causes someone to get sick, or worse, die.\(^9^7\) Eliminating liability is clearly not

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88. Gonzales v. Raich, 545 U.S. 1, 17–19 (2005) (discussing the similarities of *Raich* with the *Wickard* case).
89. *Id.* (embracing an expanded view of the Commerce Clause).
91. See *Lopez*, 514 U.S. at 549 (carrying a gun to school was not related to interstate commerce).
92. See *Raich*, 545 U.S. at 1 (regulation of marijuana production related to interstate commerce).
94. *Id.* at 130–32 (expressing that the bill’s modest scope and other factors make a constitutional challenge unlikely and that public policy remains tilted toward donation laws).
95. *Id.* at 131–32.
96. See *supra* Part II.
97. See Cohen, *supra* note 41, at 477 (indicating that “companies do not view the Good Samaritan Act as a sufficient shield to negative publicity”).
enough to entice some donors to simply hand over their excess goods. They often need extra assurance that they are not going to harm their reputation. While the free-market has created some solutions (in the form of food sorting, storing and transporting processes) to help donors ensure that their donated food is not mishandled, these solutions might not be a financially feasible option for all potential donors.

As discussed previously, Food Donation Connection (FDC) is one organization that partners with the food service industry (most of their customers are restaurant chains) to create a “Harvest Program.” They work with these donors to implement food safety procedures. However, FDC charges for consultation and for program implementation. For smaller producers or businesses, the extra costs to ensure donated food is safe might mean stretching limited resources. If donors choose to navigate the donation process on their own it will take time and energy to sort through food products, which is an essential part of complying with the Emerson Act’s definition of “apparently wholesome food.”

98. Id.


101. Id.

102. See FOOD DONATION CONNECTION, DONATE SURPLUS WHOLESOME FOOD WITH THE FOOD DONATION CONNECTION HARVEST PROGRAM, 13, http://www.foodtodonate.com/pdfs/FDC_Harvest_Program.pdf (last visited May 1, 2012) [hereinafter FDC HARVEST PROGRAM]. The FDC charges a fee of 15% of the incremental tax savings. Id. This fee is to be paid from the company’s tax savings, “using money you would not have had if you were not donating.” Id. Because C corporations—those that are subject to corporate income tax—are the only entities eligible for the enhanced deduction, however, other members of the food industry would have to accommodate the expense of the Harvest Program in their operating budgets. Id.


In addition, there are often costs relating to storing the food before it goes to shelters, pantries, or kitchens. Even if a donor is not worried about their reputation, simple compliance with the law takes time and energy, which results in forgone opportunity costs.

On June 14, 2001, Bill Reighard, then-President of FDC, testified before the Subcommittee on Human Resources and the Subcommittee on Select Revenue Measures within Oversight of the House Committee on Ways and Means that “[o]ne of the major reasons this food is not getting to the hungry is because businesses cannot offset the costs of donating it.” Reighard explained that “[i]t takes management commitment and money to properly save excess food for donation to hunger agencies.” These costs accrue over time and could actually become a burden for smaller operations. While donors might have different motivations for giving charitable contributions, economic considerations are important. Fortunately, there are public policy methods for offsetting these costs.

A. History of Tax Incentives for Food Donation

The last decade has seen the resurgence of the idiomatic “carrot” to encourage excess food donation. A tax deduction or credit has a likelihood of increasing an individual’s or corporation’s willingness to donate. But while some inroads have already been made into the U.S. Tax Code, Congress could do

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105. See Hearing on H.R. 7, supra note 103, at 100–01 (explaining that operating procedures and food safety standards must be developed and implemented).
106. See id. (giving an explanation of the operating procedures and procedure for properly saving excess food).
107. Id. at 100.
108. Id.
109. Danshera Cords, Charitable Contributions for Disaster Relief: Rationalizing Tax Consequences and Victim Benefits, 57 CATH. U. L. REV. 427, 453 (2008) (explaining that economic considerations are important when deciding to give money) (The argument could be used for gifts of inventory as well).
111. Cords, supra note 109, at 453.
more to close an inequality between the treatment of larger corporate donors and smaller donors like individual farmers and ranchers.\textsuperscript{112}

In 1977, when California State Senator John Nejedly drafted S.B. 199 (The California “Good Samaritan Donor Act”), he included a tax deduction for the donor that was equal to the cost of the donated product.\textsuperscript{113} California’s Franchise Tax Board opposed this provision because they claimed it would create an unwise tax incentive by providing business taxpayers with a double deduction for the donated product.\textsuperscript{114} The Board explained:

[The taxpayer would be allowed a business deduction equal to the cost of the product so donated in addition to the taxpayer’s trade and business expense deduction or charitable contribution deduction. In other words, a taxpayer would be able to claim a double tax deduction for the costs of producing agricultural goods. . . . Rather than a real incentive, this bill would give a windfall benefit to those who would have donated these products in any event.\textsuperscript{115}]

While S.B. 199 passed (even amidst the questions of fairness),\textsuperscript{116} the federal government took a slightly different approach when they decided to incentivize food donation.\textsuperscript{117}

At the federal level, prior to 1969, taxpayers who contributed property to charities could deduct the contribution for the fair market value.\textsuperscript{118} Fair market value is what the property “will sell for as between one who wants to purchase and one who wants to sell.”\textsuperscript{119} Because donors could deduct the fair market value, it meant that no tax was imposed for the appreciated value of the property.\textsuperscript{120} To illustrate this transaction: a farmer who wanted to donate a portion of his crop (say $2000 worth of apples) could receive a tax deduction for the fair market value of those crops (the full $2000).\textsuperscript{121} He or she could also avoid pay-
ing the tax on the difference between the production costs for the donated crops and their fair market value, however, simply by donating them. Because a do-

122. Id.

123. Id.


129. Tax Reform Act of 1976 § 2135, 90 Stat. at 1929 (codified at I.R.C. § 170); see also JACKSON, supra note 112, at 3 n.2, 3. “[T]he Internal Revenue Code normally subjects corporate profits to the corporate income tax under subchapter C; corporations subject to income tax are therefore referred to as ‘C corporations.’” “S corporations,” by contrast, “are not subject to the corporate income tax and their net profits are passed through the individual shareholders.”

that the enhanced deduction could not be greater than the sum of “one half of the amount computed under (1)(A)” and could not “exceed twice the basis of such property.”\(^\text{131}\) The basis cost is the food costs plus the direct labor.\(^\text{132}\) Therefore, the deduction calculation starts with the fair market value or selling price of the donated property, then subtracts one-half the amount of the unrealized appreciation (fair market value minus costs).\(^\text{133}\) The resulting amount is “reduced by any amount exceeding twice the property’s basis” costs (food costs plus the direct labor).\(^\text{134}\) Here is an example to illustrate the deduction calculation:\(^\text{135}\)

Donated Food Item (a 20lbs. sack of potatoes)

**Step One:**
Fair Market Value: $10.00
Subtract the Costs Basis: - $3.25
Unrealized Appreciation: $6.75

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Fair Market Value:  $10.00
Subtract the Costs Basis:          - $3.25
Unrealized Appreciation:          $6.75
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**Step Two:**
One-half of the Unrealized Appreciation Cost Basis: $3.25
Plus One-half Of the Unrealized Appreciation +$3.38
$6.63
Total: $6.63
Limited by Two Times the Costs Basis $6.50

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Step Two:
One-half of the Unrealized Appreciation Cost Basis: $3.25
Plus One-half Of the Unrealized Appreciation +$3.38
$6.63
Total: $6.63
Limited by Two Times the Costs Basis $6.50
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**Total Deduction:** $6.50

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132. See FDC HARVEST PROGRAM, supra note 102, at 8 (showing that “cost” is a combination of both the food costs and the direct labor).
133. Fowler & Henchy, supra note 127, at 4.
134. Id.
135. FDC HARVEST PROGRAM, supra note 102, at 8.
As a side note, in general, a C corporation’s charitable contribution deductions for a given year may not exceed ten percent of the corporation’s taxable income.\textsuperscript{136}

While Congress wanted to encourage charitable giving by allowing the qualified enhanced deduction, there does not appear to be a clear reason why they favored contributions from C corporations over donations by other businesses or taxpayers.\textsuperscript{137} In fact, over the last five years, Congress periodically extended this enhanced deduction to other types of businesses, sole proprietors, partnerships, and S corporations, albeit only temporarily.\textsuperscript{138}

B. Modern Trends in Federal Tax Incentives

On September 23, 2005, Congress passed the Katrina Emergency Tax Relief Act (KETRA) in response to emergency needs in the Gulf area.\textsuperscript{139} The law extended the I.R.C. section 170(e)(3)(C) enhanced deduction provision to all business entities.\textsuperscript{140} And like C corporations, the total annual deductions could not exceed ten percent of the taxpayer’s aggregate net income.\textsuperscript{141} Understandably, Hurricane Katrina created an immediate and substantial amount of need and, because expanding the enhanced deduction could stimulate giving, it seemed like a quick solution.\textsuperscript{142} It is also likely that passing the Act allowed Congress to feel as if they were responding to crisis in the midst of a public criticism. It is important to note, however, that Congress also gave the expansion a sunset date of December 31, 2005.\textsuperscript{143}

In December 2005, the extension did expire, but in March 2006 the Bush Administration expressed renewed interest in revising this portion of the Tax Code (as they had previously done in 2003, 2004, 2005, and 2006).\textsuperscript{144} Under the

\begin{thebibliography}{9999}
\bibitem{137} STAFF OF THE J. COMM. ON TAXATION, JCS-1-07 No. 15, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 109TH CONGRESS PART SEVEN: KATRINA EMERGENCY TAX RELIEF ACT OF 2005 (PUBLIC LAW 109-73) 9–10 (J. Comm. Print 2007) (although seeing fit to extend deductions beyond C corporations for short periods, no explanation is given as to why C corporations are favored in the original law).
\bibitem{139} Id.
\bibitem{140} Id.
\bibitem{141} Id.
\bibitem{142} Cords, supra note 109, at 431.
\bibitem{143} Katrina Emergency Tax Relief Act § 305, 119 Stat. at 2025.
\bibitem{144} STAFF OF THE J. COMM. ON TAXATION, 109TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2007 BUDGET PROPOSAL 67, 70 (J. 2007).
\end{thebibliography}
2007 Bush Proposal, the deduction for donations given by S corporations and other non-corporate taxpayers, who had a zero or low basis in their food donations, would be equal to fifty percent of the food’s fair market value. The proposal also provided C corporations with a deduction equal to the fair market value of the apparently wholesome food or twice the basis cost of the food. It did so by taking into account the price at which the same food items are sold by the taxpayer at the same time. Consequently, this proposal went beyond the extensions of KETRA to the original fair market value deductions that existed prior to 1969 and had been rejected by Congress.

Critics once again argued that allowing a fair market value deduction for C corporations would be too generous because it would allow some taxpayers to find themselves in a better position by donating the food to charity than selling the food in the commercial market. One report from the Joint Committee on Taxation explained,

[...]his possible outcome is a result of permitting a deduction for a value that the taxpayer may not be able to achieve in the market. Whether sold or donated, the taxpayer incurred a cost to acquire the good. When a good is donated, it creates “revenue” for the taxpayer by reducing his or her taxes otherwise due. When the value deducted exceeds the revenue potential of an actual sale, the tax savings from the charitable deduction can exceed the sales revenue from a sale.

The report also explained that while this type of outcome is possible, it was not likely, because the proposal limited the enhanced deduction to the lesser of either the fair market value or twice the donor’s basis. Therefore, for C corporations, if the deduction were still limited by twice the donor’s basis, the expectation was that it might not have any substantial effect because the amount eligible for deduction would not truly increase. It appears the additional changes in the law, however, would indeed needlessly complicate the deduction calculation.

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145. Staff of the J. Comm. on Taxation 2006, supra note 112, at 5.
146. Id.
147. Id.
149. Staff of the J. Comm. on Taxation 2006, supra note 144, at 68.
150. See id. at 69 n.106 (illustrating math under proposal that showed neutral effect of donation over commercial profit).
Regardless, the 2006 Bush Tax Proposal did not gain any real traction at the time. Instead, Congress acted in August 2006 by passing the Pension Protection Act which merely extended the KETRA provisions for S corporations and others through December 31, 2007. In 2008, the Emergency Economic Stabilization Act extended the same provisions through December 31, 2009. Eventually, in 2010, Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act, which retroactively provided the deduction to all businesses from January 1, 2010 until December 31, 2011. The enhanced deduction expired as scheduled at the end of 2011. This rather bizarre process of incrementally extending the enhanced deduction seems inefficient when one considers that there have been several efforts over the last eleven years to permanently change this portion of the U.S. Tax Code.

One lawmaker in particular, U.S. Sen. Richard Lugar (R-IN) has consistently advocated for permanent adoption of the extension. U.S. Sen. Richard Lugar of Indiana was first elected to the Senate in 1976. He is currently the senior-most Republican in the Senate and is a long-time advocate for hunger issues in the United States. As a man from the heartland of America, it is not surprising that he also manages his family’s 604-acre farm. As a businessman and farmer he saw the challenges faced by non-corporate donors who want to make a positive difference for charities in Indiana and across the country.

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162. About Senator Lugar, supra note 160.
In 2000, Sen. Lugar introduced the Hunger Relief Tax Incentive Act.\footnote{163} The legislation was aimed at amending I.R.C. section 170(e) by adding a provision to allow the enhanced deduction for qualified food contributions to non-corporate donors.\footnote{164} After introduction, the Bill was referred to the Senate Finance Committee where the Bill ultimately died.\footnote{165} In 2001, Sen. Lugar introduced the Good Samaritan Hunger Relief Tax Incentive Act, which extended the enhanced deduction for non-corporate donors, but also placed a fair market value limit.\footnote{166} If a taxpayer used the cash method of accounting, the basis of any qualified contribution would be deemed fifty percent of the fair market value of such contribution.\footnote{167} This method of calculation addressed the accounting processes of non-corporate donors like S corporations, sole proprietors, and others.\footnote{168} What the provision did was effectively create a full fair market value deduction for non-corporate donors.\footnote{169} The Bill also retained the limited the reduction for C corporations at twice the basis cost, but later versions of this Bill would also provide a fair market value for corporate donors as well.\footnote{170} To help illustrate this deduction, below is an example of this calculation for an S corporation.\footnote{171}

Donated Food Item (a 20lbs. sack of potatoes)

**Step One:**
Fair Market Value: \$10.00

**Step Two:**
The basis cost under the Bill is 50% of the fair market value: \$5.00
The deduction is limited to twice the basis cost: \$5.00
\[ \times 2 \]

\footnotesize{\footnote{163}{Hunger Relief Tax Incentive Act, S. 2084; 146 CONG. REC. 1398 (2000).}}
\footnotesize{\footnote{164}{Hunger Relief Tax Incentive Act, S. 2084, § 2(a).}}
\footnotesize{\footnote{165}{146 CONG. REC. 1398 (2000).}}
\footnotesize{\footnote{166}{Good Samaritan Hunger Relief Tax Incentive Act, S. 37, § 2.}}
\footnotesize{\footnote{167}{Id. § 2(a).}}
\footnotesize{\footnote{168}{Id.}}
\footnotesize{\footnote{169}{Id. (determining that the calculation for basis is fifty percent of the fair market value, but the deduction is limited to twice the basis).}}
\footnotesize{\footnote{170}{Id.; Good Samaritan Hunger Relief Tax Incentive Extension Act of 2011, 112th Cong. S. 166 § 2 (2011).}}
\footnotesize{\footnote{171}{See Good Samaritan Hunger Relief Tax Incentive Act, S. 37 § 2 (modified calculation example derived from the calculation description).}}
Like its predecessor, this Bill was also referred to the Senate Finance Committee and, on March 14, 2001, a hearing was held.172

At the hearing, Sen. Lugar explained that, “the bipartisan [B]ill will provide important tax incentives for our Nation’s farmers, restaurant owners, and corporations to donate food to hunger relief organizations.” He further explained that, “[i]n many ways, the current tax law is a hindrance to food donations. The Tax Code provides corporations with a special deduction for donations to food banks, but it excludes farmers, ranchers and restaurant owners from donating food using the same tax incentive.” He added that the act would, “realign the economies of food donating food by extending the special deduction to all business taxpayers, including the self-employed, and by increasing this deduction to the fair market value of the donation.” Sen. Charles Grassley (R-IA), the Chairman of the Finance Committee, chimed in at the hearing and offered that the rationale was that “we do this for corporations, this would do it for individuals and self-employed people, and small businesses that are not incorporated.” Sen. Lugar agreed and offered an anecdotal example of apple farmers who bring in their unsold apples for donation at the end of the season without even a thought of a deduction. The Finance Committee also allowed Douglas O’Brien, then-Director of Public Policy & Research at America’s Second Harvest to speak on behalf of the charitable organizations and their patrons, who would benefit most directly from the legislation. O’Brien spoke extensively about the increased demand for emergency food sources in the United States. He concluded by strongly supporting Sen. Lugar’s Bill, agreeing that “[i]t would expand the current special rule deduction allowed to regular corporations, to small businesses, restaurant owners, and farmers, and it would simplify the deduction formula for all business taxpayers.” O’Brien provided an example of potato farmers donating potatoes to the Montana food bank which operates a

172. Encouraging Charitable Giving, supra note 19.
174. Id. at 2–3.
175. Id. at 3.
176. Id. at 4 (statement of Sen. Charles Grassley, Chairman, S. Comm. on Fin.).
177. Id. (statement of Sen. Richard G. Lugar)
178. Id. at 9 (statement of Douglas O’Brien, Director of Pub. Policy & Research, America’s Second Harvest).
179. Id. at 10.
180. Id. at 11.
cannery project. He explained that the cost of packaging, cleaning, and transporting the potatoes to the cannery actually exceeded what they get through a charitable deduction vis-a-vis the current law. O’Brien believed that changing the law would provide an enormous incentive and would solve the obvious tax equity issue between corporate and non-corporate donors. But, despite bipartisan support and broad backing from numerous national organizations, this Bill also died in committee.

What the history of these temporary tax expansions demonstrates is that lawmakers at least took notice of the power these tax incentives have. The enhanced deduction stimulates giving, or at least makes giving more economically feasible for donors to continue their good acts. Remember, donors could always choose to throw the food away. It is troubling that Congress has failed to give equal footing to all donors—especially non-corporate farmers and ranchers. The record demonstrates that Sen. Lugar has introduced numerous pieces of legislation (with a number of co-sponsors) to codify a permanent enhanced deduction for farmers, ranchers, restaurant owners, and other small businesses. Each bill was referred to the Senate Finance Committee where it, in due course, met its untimely death.

On January 25, 2011, Sen. Lugar once again introduced the Good Samaritan Hunger Relief Act. He urged that “[m]ore than ever, we need to do what can to restock the shelves of America’s food pantries and soup kitchens . . . [as] more of our neighbors have to rely on these services.” After introduction,

181. Id. at 26.
182. Id.
183. Id.
188. Good Samaritan Hunger Relief Tax Incentive Extension Act, S. 166.
189. Press Release, Lugar Introduces Act, supra note 159.
the Bill was referred to the Senate Finance Committee—perhaps another death sentence for this Bill.

In the midst of partisan wrangling over the federal budget and debt, what will likely kill the Bill in future sessions is the Senate’s PAYGO rule. The general purpose of PAYGO is “to prevent the enactment of mandatory spending or revenue legislation that would cause or increase a deficit.” The current PAYGO provision in the U.S. Senate was established during the 2008 Fiscal Year and “prohibits the consideration of direct spending or revenue legislation that is projected to increase or cause an on-budget deficit . . . [and] applies to any bill, joint resolution, amendment, motion, or conference report that affects direct spending or revenues.” In addition to Senate PAYGO, Congress passed the Statutory Pay-As-You-Go Act of 2010, which ensures that the new direct spending and revenue legislation does not add to the deficit. As of now, it is highly unlikely that Congress would approve of cuts to spending in other areas to equalize tax incentives for businesses—even for a cause this noble. It is even more unlikely that the Senate would waive the PAYGO rule to allow a bill of this type to make it to the floor as part of a larger revenue bill like those passed in subsequent years. Because the legislation did not garner more support, the enhanced deduction provision for farmers, ranchers, restaurant owners and other small businesses expired last year. Without hesitation, lawmakers should at least pass retroactive legislation (even if it is temporary) providing the deduction to as many non-corporate donors who might have already relied on the law to offset costs.

IV. CONCLUSION

It may not be this year, or the next, disappointedly, and another decade may pass by without decisive action, but eventually Congress must take the step to permanently expand the enhanced deduction for all business donors, including farmers, ranchers, and small restaurants owners. There is ample evidence that these non-corporate business owners, who often donate and do not expect any-

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190. Good Samaritan Hunger Relief Tax Incentive Extension Act, S. 166.
193. Id.
thing in return, need help offsetting the costs of donating their excess food. While it is certainly debatable whether or not the deduction should be increased to the fair market value of the donated item, it is virtually undisputed that we should treat donors equally. After all, it was a group of small local donors who trusted and built a relationship with John van Hengel when he founded Feeding America. Unexpectedly, in May 2012, Sen. Lugar lost his Primary Election battle to a Republican challenger. Sen. Lugar’s departure from the Senate is a tremendous loss for hunger relief advocacy in the halls of Congress. The question that remains is who will continue the good fight for these Good Samaritans.

198. Sullivan, supra note 5.