

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

*Stacey H. Van Zuiden**

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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 incentives for *all* food donors continues to stall in Congress, jeopardizing food donation by many commendable Good Samaritans.²

* J.D., Drake University Law School, 2012.

1. BILL AYRES ET AL., NAT’L ANTI-HUNGER ORGS., A BLUEPRINT TO END HUNGER 2008, at 3 (2008), *available at* <http://www.pittsburghfoodbank.org/pdf/NationalBlueprint.pdf>.

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 Tax Incentive Extension Act of 2009, S. 1313, 111th Cong. § 2 (2009) (read twice and referred to

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.³ The organization noted sizeable increases in the number of unduplicated clients served weekly from 2005 to 2009.⁴ 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.⁵

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.⁶ Over time, the organization grew into a network of food pantries, kitchens, and shelters that distribute food donations and leftovers.⁷ Eventually, this network was incorporated as "America's Second

Comm. on Fin.); Good Samaritan Hunger Relief Tax Incentive Extension Act of 2007, S. 689, 110th Cong. § 2 (2007) (read twice and referred to Comm. on Fin.); Good Samaritan Hunger Relief Tax Incentive Act, S. 94, 109th Cong. § 2 (2005) (read twice and referred to Comm. on Fin.); Good Samaritan Hunger Relief Tax Incentive Act, S. 85, 108th Cong. § 2 (2003) (read twice and referred to Comm. on Fin.); Good Samaritan Hunger Relief Tax incentive Act, S. 37, 107th Cong. § 2 (2001) (read twice and referred to Comm. on Fin.); Hunger Relief Tax Incentive Act, S. 2084, 106th Cong. § 2 (2000) (read twice and referred to Comm. on Fin.).

3. JAMES MABLI ET AL., MATHEMATICA POLICY RESEARCH, INC., HUNGER IN AMERICA 2010: NATIONAL REPORT PREPARED FOR FEEDING AMERICA 43 (2010), available at http://feedingamerica.issuelab.org/research/listing/hunger_in_America_2010_national_report.

4. *Id.* at 60.

5. Patricia Sullivan, *John van Hengel Dies at 83; Founded 1st Food Bank in 1967*, WASH. POST, Oct. 8, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/07/AR2005100701911.html>.

6. *Id.*

7. *Id.*

Harvest,”⁸ 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-

8. *Id.*

9. Press Release, Feeding Am., America’s Second Harvest Changes Name to Feeding America (Sept. 5, 2008), available at <http://feedingamerica.org/press-room/press-releases/name-change.aspx>.

10. See *Mission and Values*, FEEDING AM., <http://feedingamerica.org/how-we-fight-hunger/mission-and-values.aspx> (last visited May 1, 2012) (stating “[o]ur mission is to feed America’s hungry through a nationwide network of member food banks and engage our country in the fight to end hunger.”).

11. MABLI ET AL., *supra* note 3, at 43.

12. See USDA & U.S. ENVTL. PROT. AGENCY, EPA-530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY 11 (1999), available at http://www.epa.gov/wastes/conserves/materials/organics/pubs/wast_not.pdf (explaining that “[t]here are several types of food recovery programs providing food [for] the needy.”); USDA, A CITIZEN’S GUIDE TO FOOD RECOVERY 1 (1996).

13. MABLI ET AL., *supra* note 3, at 346.

14. *Id.* at 279.

15. See U.S. ENVTL. PROT. AGENCY, EPA-530-F-98-023, DON’T THROW AWAY THAT FOOD: STRATEGIES FOR RECORD-SETTING WASTE REDUCTION 1 (1998), available at <http://www.epa.gov/osw/conserves/materials/organics/pubs/throw/foodmain.pdf> (outlining the advantages and potential options for food recovery programs); Linda Scott Kantor et al., USDA, *Estimating and Addressing America’s Food Losses*, FOODREVIEW, Jan.–Apr. 1997, at 3, available at <http://www.ers.usda.gov/publications/foodreview/jan1997/jan97a.pdf> (according to the USDA, if five percent of consumer, retail, and food service food discards were recovered in 1995 this would have provided the equivalent of a day’s food for 4 million people).

nually.¹⁶ This waste happens “in fields, commercial kitchens, manufacturing plants, markets, schools, and restaurants.”¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ 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.

17. Carol Browner & Dan Glickman, *Foreword to USDA & U.S. ENVTL. PROT. AGENCY, EPA-530-R-99-040, WASTE NOT, WANT NOT: FEEDING THE HUNGRY AND REDUCING SOLID WASTE THROUGH FOOD RECOVERY*, at iii.

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”).

20. *See* Bill Emerson Good Samaritan Food Donation Act, Pub. L. No. 104-210, 110 Stat. 3011 (codified at 42 U.S.C. § 1791(c) (2006)) (first federal law passed legally alleviating donor liability); *see also United States Tax Benefits*, FOOD DONATION CONNECTION, <http://www.foodtodonate.com/Fdcmain/TaxBenefits.aspx> (last visited May 1, 2012) (discussing federal tax deduction legislation proposed in 2009).

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, causing 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 incentives are two identifiable areas where this reform occurred.²⁵ Today, tort liability 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 appreciation of the costs associated with donating excess food.²⁶ There is good news, however. The opportunity for change exists and traditionally has had bipartisan Congressional 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 encourage 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).

24. *See, e.g.*, 1977 Cal. Stat. 2949 (codified at CAL. FOOD & AGRIC. CODE §§ 58501–58509 (West 1997 & Supp. 2012)) (California was the first state to pass a law relieving food donors of liability); Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1928–29 (1976) (codified in scattered sections of 26 U.S.C.).

25. 42 U.S.C. § 1791 (2006 Supp. IV 2010); I.R.C. § 170(e)(3)(C) (2006 & Supp. IV 2010).

26. *See, e.g.*, Good Samaritan Hunger Relief Tax Incentive Extension Act of 2011, S. 166, 112th Cong. § 2 (2011); 157 CONG. REC. S126 (daily ed. Jan. 25, 2011) (bill read and referred to the Committee on Finance).

27. *See, e.g.*, Good Samaritan Hunger Relief Tax Incentive Act, S. 37, 107th Cong. (2001) (introduced by Sen. Richard G. Lugar, a Republican, and Sen. Patrick Leahy, a Democrat).

28. *See, e.g.*, 1977 CAL. STAT. 2949 (codified at FOOD & AGRIC. §§ 58501–58509); 1979 Wash. Sess. Laws 450–51 (codified at WASH. REV. CODE § 69.80.031 (2011)); David L. Morenoff,

sonal liability for injuries caused by donated food.²⁹ Good Samaritan laws limited liability rather than requiring strict liability, the standard traditionally used in defective product cases.³⁰

California was the first state to enact legislation of this type.³¹ 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.³² 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.³³ 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.³⁴ 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.³⁵ Ultimately, California lawmakers determined that the benefits of feeding hungry families overcame any potential harm.³⁶ Although, as a final compromise, the Bill was amended to allow for donor liability if there was “gross

Lost Food and Liability: The Good Samaritan Food Donation Law Story, 57 FOOD & DRUG L.J. 107, 108 (2002).

29. H.R. REP. NO. 104-661, at 2–3 (1996); see Morenoff, *supra* note 28, at 109–10.

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.

31. 1977 CAL. STAT. at 2950 (codified at FOOD & AGRIC. § 58505).

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)).

34. 1977 Cal. Stat. 2949 (codified at FOOD & AGRIC. §§ 58501–58509).

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.³⁷ With this last amendment adopted, the Bill passed the assembly with unanimous support.³⁸

Over the next decade, all fifty states adopted Good Samaritan food donation laws in one form or another.³⁹ 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.⁴⁰ There were also variations of the term “donated goods.”⁴¹ Inconsistency in state law made donating exceedingly complicated for multistate corporations and threatened to impede donative behavior.⁴² This led interested parties, including America’s Second Harvest, to Capitol Hill, where they hoped to find another sympathetic lawmaker.⁴³ 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.⁴⁴

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.⁴⁵ 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

37. See FOOD & AGRIC. § 58505 (the statute as codified would alleviate liability “except for any injury resulting from gross negligence or willful act”); Morenoff, *supra* note 28, at 112; see also, e.g., Letter from Richard B. Sporn, Cal. Dept. of Consumer Affairs to John A. Nejedly (Mar. 23, 1977) (on file with the California State Archives) (expressing concern over the legal implications of the original Act’s proposed exemption of donators from “any liability due to any act, or the omission of any act”).

38. FOOD & AGRIC. §§ 58501–58509; 1977–78 REG. SESS., S. FINAL HISTORY, at 133 (Cal. 1978) (passed Assembly seventy-three ayes to zero noes, and the Senate twenty-five ayes to zero noes); Morenoff, *supra* note 28, at 112.

39. Morenoff, *supra* note 28, at 116.

40. *Id.*

41. See Jessica A. Cohen, Note, *Ten Years of Leftovers with Many Hungry Still Left Over: A Decade of Donations Under the Bill Emerson Good Samaritan Food Donation Act*, 5 SEATTLE J. SOC. JUST. 455, 473–74 (2006) (giving the example of Missouri’s statute only mentioning “canned or perishable food” while New York listed “game”).

42. See Morenoff, *supra* note 28, at 116 (explaining that some potential donors “did not want to sort out” what different state standards meant).

43. See *id.* at 117 (describing America’s Second Harvest’s push for national legislation).

44. See *id.*

45. See Bill Emerson Good Samaritan Food Donation Act of 1996, Pub. L. No. 104-210, 110 Stat. 3011 (codified at 42 U.S.C. § 1791 (2006)).

uniform donor protection standards.⁴⁶ 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.⁴⁷ 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.⁴⁸ Thankfully for Danner, one of her senior colleagues from Missouri, Representative Bill Emerson—a Republican—became a Bill co-sponsor.⁴⁹

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 1983.⁵⁰ He had also held leadership positions on the House Agricultural Committee, the House Select Committee on Hunger, and the Congressional Hunger Center.⁵¹ Today, his influence (as evidenced by the Act's title) is seen as the driving force behind the Bill's success.⁵²

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.⁵³ 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.⁵⁴

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

46. National and Community Service Act of 1990, Pub. L. No. 101-610, §§ 401–02, 104 Stat. 3127 (1990); Morenoff, *supra* note 28, at 117. The Model Good Samaritan Act merely indicated the sense of Congress, and expressly stated that it would not carry the force of law. Morenoff, *supra* note 28, at 117.

47. 141 CONG. REC. H9737 (daily ed. Sept. 29, 1995); Morenoff, *supra* note 28, at 121.

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.

49. 142 CONG. REC. H2558 (daily ed. Mar. 20, 1996); Morenoff, *supra* note 28, at 122.

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.").

53. *Good Samaritan Food Donation Act: Hearing on H.R. 2428 Before the Subcomm. on Postsecondary Educ., Training, and Life-long Learning of the H. Comm. on Econ. & Educ. Opportunities*, 104th Cong. (1996) (statements of Rep. Bill Emerson & Rep. Pat Danner).

54. H.R. REP. NO. 104-661, at 3.

1996.⁵⁵ 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.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.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.⁵⁸ This final amendment appeared to placate the parties involved, thereby allowing the Senate to also pass the Bill by voice vote.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.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."⁶¹ The law has remained unchanged since the Act's passage in 1996.⁶²

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.⁶³ Food Donation Connection (FDC), an organization which "manages food donation programs for food service companies" confidently ad-

55. H.R. Res. 459, 104th Cong. (1996); H.R. REP. NO. 104-661, at 4; Morenoff, *supra* note 28, at 123.

56. H.R. REP. NO. 104-661, at 4; 142 CONG. REC. H7477-80 (daily ed. July 12, 1996); Morenoff, *supra* note 28, at 124.

57. Bill to Enact the Model Good Samaritan Food Donation Act, S. 1938, 104th Cong. (1996); Morenoff, *supra* note 28, at 124-25.

58. 142 CONG. REC. S9532 (daily ed. Aug. 2, 1996) (statement of Sen. Edward M. Kennedy); Morenoff, *supra* note 28, at 125.

59. 142 CONG. REC. S9532-33 (daily ed. Aug. 2, 1996); Morenoff, *supra* note 28, at 125.

60. Bill Emerson Food Donation Act of 1996, Pub. L. No. 104-210, § 1(a)(1)(D), 110 Stat. 3011, 3011-12 (1996) (codified at 42 U.S.C. § 1791 (2006)).

61. 42 U.S.C. § 1791(b)(2) (2006).

62. *Id.*

63. See Morenoff, *supra* note 28, at 132 (both the USDA and America's Second Harvest have featured the law on websites or in various published materials); see, e.g., *Protecting Our Food Partners*, FEEDING AM., <http://feedingamerica.org/get-involved/corporate-opportunities/become-a-partner/become-a-product-partner/protecting-our-food-partners.aspx> (last visited May 1, 2012).

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.”⁶⁴ The USDA and Feeding America have also featured the law in publicity materials with the hope that the Act would encourage new donations.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.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.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.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.⁶⁹

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

64. *About Us*, FOOD DONATION CONNECTION, <http://www.foodtodonate.com/Fdcmain/About.aspx> (last visited May 1, 2012); *United States Legal Liability Issues*, FOOD DONATION CONNECTION, <http://www.foodtodonate.com/Fdcmain/LegalLiabilities.aspx> (last visited May 1, 2012).

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).

66. *Food Donation: Feed People—Not Landfills*, U.S. ENVTL. PROT. AGENCY (Feb. 17, 2012), <http://www.epa.gov/osw/conserves/materials/organics/food/fd-donate.htm>.

67. See Rekha Balu, *Industry Focus: Food Industry’s Efficiency Poses Dilemma for Charity*, WALL ST. J., Dec. 18, 1998, at B4.

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. *Id.* The initiative places particular emphasis on food donations to hunger relief organizations and food waste education. *Id.*

69. Morenoff, *supra* note 28, at 131.

70. *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.⁷¹ 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.⁷² These two concerns were succinctly raised by David L. Morenoff in his article, *Lost Food and Liability: The Good Samaritan Food Donation Law Story*.⁷³ 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.⁷⁴ 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.⁷⁵ 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."⁷⁶ 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.⁷⁷

Additionally, the constitutionality of this type of legislation is reinforced by a far-reaching interpretation of the Commerce Clause.⁷⁸ Morenoff had suggested that the Emerson Act could be challenged as unconstitutional in light of Commerce Clause jurisprudence at the time of his article.⁷⁹ He believed it was necessary to determine if constraints placed on Congress' Commerce Clause

71. See Bill Emerson Food Donation Act of 1996, Pub. L. No. 104-210, 110 Stat. 3011 (codified at 42 U.S.C. § 1791 (2006)).

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).

73. Morenoff, *supra* note 28, at 126–30.

74. *Id.* at 127; see also Memorandum from Dawn E. Johnsen, Acting Assistant Attorney Gen., Office of Legal Counsel, for James S. Gilliland, Gen. Counsel, USDA (Mar. 10, 1997), available at <http://www.justice.gov/olc/bressman.htm>.

75. Memorandum from Dawn E. Johnsen for James S. Gilliland, *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).

79. Morenoff, *supra* note 28, at 129–30.

power because *United States v. Lopez*⁸⁰ would cast some doubt on the legal soundness of the Emerson Act.⁸¹ 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.⁸² 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.”⁸³

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.⁸⁴ 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.⁸⁵ A court today would not isolate the Emerson Act from its practical effects, drawing from Commerce Clause analysis more akin to *Wickard v. Filburn*⁸⁶ than *Lopez*.⁸⁷ Furthermore, *Gonzales v. Raich* (the 2005 U.S. Supreme Court case upholding the federal criminalization of medicinal marijuana harvest-

80. See *United States v. Lopez*, 514 U.S. 549, 558–60 (1995) (requiring that any federally regulated local activity must “substantially affect interstate commerce”).

81. Morenoff, *supra* note 28, at 128–29.

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).

86. *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (upholding a federal law restricting a farmer’s right to grow wheat for his own use because of its impact on 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.⁸⁸ This confirmed that a broad and powerful Commerce Clause reading is very much alive and functioning today.⁸⁹

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.⁹⁰ The aforementioned reasons explain why excess food donation bears a stronger relationship to the economy than carrying a gun onto school grounds,⁹¹ and therefore would more likely find support for constitutional validation under *Raich*.⁹²

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.⁹³ In fact (to the contrary) he believed that the great weight of public policy was on the side of donor immunity.⁹⁴ He felt that it was likely that the Emerson Act was ensconced in positive social reinforcement and therefore trustworthy for donors.⁹⁵ 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.⁹⁶ 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.⁹⁷ Eliminating liability is clearly not

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).

90. *Id.* at 18 (citing *Wickard v. Filburn*, 317 U.S. 111) (2006).

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).

93. Morenoff, *supra* note 28, at 130.

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.⁹⁸ 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.⁹⁹

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.”¹⁰⁰ They work with these donors to implement food safety procedures.¹⁰¹ However, FDC charges for consultation and for program implementation.¹⁰² For smaller producers or businesses, the extra costs to ensure donated food is safe might mean stretching limited resources.¹⁰³ 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.”¹⁰⁴

98. *Id.*

99. *Id.*; see also, e.g., *Perishable Food*, FEEDING AM., <http://feedingamerica.org/get-involved/corporate-opportunities/become-a-partner/become-a-product-partner/perishable-food.aspx> (last visited May 1, 2012) (describing food safety packaging, handling, and storage guidelines for product donations in the Feeding America Food Bank network); *Food Bank Donations*, COLO. FARM TO MARKET, <http://cofarmtomarket.com/additional-information/food-bank-donations/> (last visited May 1, 2012) (summarizing safety concerns and best management practices for donors and food distribution banks, and suggesting investments in food safety training, inspection/storage practices, and the maintenance of food recall inventories as means for Colorado donors/distributors to mitigate the risk of contamination).

100. *Services Provided by Food Donation Connection*, FOOD DONATION CONNECTION, <http://www.foodtodonate.com/Fdcmain/AdminServices.aspx> (last visited May 1, 2012).

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.*

103. See *Community Solutions Act of 2001: Hearing on H.R. 7 Before the Subcomm. on Human Res. & the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 107th Cong. 98, 100–01 (2001) [hereinafter *Hearing on H.R. 7*] (statement of Bill Reighard, President, Food Donation Connection) (testifying that businesses cannot offset the costs of donating).

104. 42 U.S.C. § 1791(b)(2) (2006) (defining “apparently wholesome food” as that which “meets all quality and labeling standards imposed by Federal, State, and local laws and regulations . . .”).

In addition, there are often costs relating to storing the food before it goes to shelters, pantries, or kitchens.¹⁰⁵ 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.¹⁰⁶

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.”¹⁰⁷ Reighard explained that “[i]t takes management commitment and money to properly save excess food for donation to hunger agencies.”¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ A tax deduction or credit has a likelihood of increasing an individual’s or corporation’s willingness to donate.¹¹¹ But while some inroads have already been made into the U.S. Tax Code, Congress could do

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).

110. See, e.g., Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 305, 119 Stat. 2016, 2025 (codified at I.R.C. § 170(e)(3)(C) (2006)) (containing a temporary provision for tax deductions on charitable contributions of food inventory); Pension Protection Act of 2006, Pub. L. No. 109-280, § 1202, 120 Stat. 780, 1066 (codified at I.R.C. § 170(e)(3)(C)(iv) (2006)) (extending the Katrina Emergency Tax Relief Act’s charitable donation deduction through 2007); Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 740, 124 Stat. 3297, 3319 (codified at I.R.C. § 170(e)(3)(C)(iv) (Supp. IV 2010)) (extending the deduction through 2011).

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.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.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.¹¹⁴ The Board explained:

[T]he 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.¹¹⁵

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

At the federal level, prior to 1969, taxpayers who contributed property to charities could deduct the contribution for the fair market value.¹¹⁸ Fair market value is what the property “will sell for as between one who wants to purchase and one who wants to sell.”¹¹⁹ Because donors could deduct the fair market value, it meant that no tax was imposed for the appreciated value of the property.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).¹²¹ He or she could also avoid pay-

112. See PAMELA J. JACKSON, CONG. RESEARCH SERV., RL 31097, CHARITABLE CONTRIBUTIONS OF FOOD INVENTORY: PROPOSALS FOR CHANGE 9–10 (2008).

113. See Bill Analysis of S.B. 199 by the Cal. S. Comm. on Agric. & Water Res., 2 (Mar. 2, 1977) (on file with the California State Archives).

114. Bill Analysis of S.B. 199 by the Cal. Franchise Tax Bd., 2 (Mar. 2, 1977) (on file with the California State Archives).

115. *Id.* at 2–3.

116. 1977 Cal. Stat. 2949 (codified at CAL. FOOD & AGRIC. CODE §§ 58501–58509 (West 1997 & Supp. 2012)).

117. See Tax Reform Act of 1969, Pub. L. No. 91-172, § 201, 83 Stat. 487, 555 (1969) (codified at I.R.C. § 170(e)(1) (2006)) (describing that the amount of any charitable contribution shall be reduced by the amount the long-term capital gain would have been had it have been sold at fair market value).

118. JACKSON, *supra* note 112, at 5.

119. BALLENTINE’S LAW DICTIONARY 452 (3d ed. 1969).

120. JACKSON, *supra* note 112, at 5.

121. *Id.*

ing the tax on the difference between the production costs for the donated crops and their fair market value, however, simply by donating them.¹²² Because a donor's tax savings could actually allow the farmer to receive a greater "after-tax benefit" than he or she would have gained from the simple sale of the crops, the law provided an unfair windfall.¹²³ But in 1969, however, this incongruity would change.

The Tax Reform Act of 1969 reduced the allowed tax deduction for donated food by the appreciated value of the donated inventory.¹²⁴ The Senate Finance Committee explained that the addition of a new section (I.R.C. section 170(e)(1)(A)) to I.R.C. section 170 (governing charitable contributions and gifts) was necessary to avoid situations where the tax savings was so large that it would not be clear how much charitable motivation still existed.¹²⁵ This standard deduction was also criticized, because the charitable organizations most affected by the new section were those that distributed food, medicine, and clothing.¹²⁶ Charities found that some donors chose to simply stop donating rather than deal with complicated restrictions under I.R.C. section 170(e).¹²⁷ In response to these new complaints, the U.S. Congress acted once again by passing the Tax Reform Act of 1976.¹²⁸ This Act added another new paragraph, (3)(A) (Qualified Contributions), to I.R.C. section 170(e), which allowed corporations (C corporations)—but not small businesses (S corporations or others)—to receive an enhanced deduction calculated under another new section: (3)(B).¹²⁹

As of this writing, I.R.C. section 170(e)(3) is nearly identical to provisions passed in 1976, save for a few changes in definitions and temporary expansions under I.R.C. section 170(e)(3)(C).¹³⁰ I.R.C. section 170 (e)(3)(B) explained

122. *Id.*

123. *Id.*

124. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 555 (1969) (codified at I.R.C. § 170(e)(1) (2006)).

125. *Id.*; S. REP. NO. 91-552, at 80 (1969).

126. STAFF OF THE J. COMM. ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976 at 672 (J. Comm. Print 1976) [hereinafter STAFF OF THE J. COMM. ON TAXATION 1976].

127. RONALD FOWLER & AMY HENCHEY, I.R.S., IN-KIND CONTRIBUTIONS IN EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION, 3 (1994), <http://www.irs.gov/pub/irs-tege/eotopice94.pdf>.

128. See Tax Reform Act of 1976 § 2135, 90 Stat. at 1928–29 (codified at I.R.C. § 170); see also STAFF OF THE J. COMM. ON TAXATION 1976, *supra* note 126, at 673.

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."

130. I.R.C. § 170(e) (2006 & Supp. IV 2010).

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.”¹³¹ The basis cost is the food costs plus the direct labor.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).¹³³ The resulting amount is “reduced by any amount exceeding twice the property’s basis” costs (food costs plus the direct labor).¹³⁴ Here is an example to illustrate the deduction calculation: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

Step Two:

One-half of the \$3.38

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

Total Deduction: \$6.50

131. Tax Reform Act of 1976 § 2535, 90 Stat. at 1929.

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.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.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.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.¹³⁹ The law extended the I.R.C. section 170(e)(3)(C) enhanced deduction provision to *all* business entities.¹⁴⁰ And like C corporations, the total annual deductions could not exceed ten percent of the taxpayer's aggregate net income.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.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, 2005.¹⁴³

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).¹⁴⁴ Under the

136. I.R.C. § 170(b)(2)(A) (2006).

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).

138. Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 305, 119 Stat. 2016, 2025 (codified at I.R.C. § 170(e)(3)(C) (2006)).

139. *Id.*

140. *Id.*

141. *Id.*

142. Cords, *supra* note 109, at 431.

143. Katrina Emergency Tax Relief Act § 305, 119 Stat. at 2025.

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 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.¹⁴⁵ 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.¹⁴⁶ It did so by taking into account the price at which the same food items are sold by the taxpayer at the same time.¹⁴⁷ 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.¹⁴⁸

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.¹⁴⁹ One report from the Joint Committee on Taxation explained,

[t]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.¹⁵⁰

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.¹⁵¹ 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.¹⁵² It appears the additional changes in the law, however, would indeed needlessly complicate the deduction calculation.¹⁵³

Comm. Print 2006) [hereinafter STAFF OF THE J. COMM. ON TAXATION 2006], available at <http://www.jct.gov/publications.html?func=startdown&id=1219>.

145. *Id.* at 67.

146. *Id.*

147. *Id.*

148. Katrina Emergency Tax Relief Act § 305, 119 Stat. at 2025; JACKSON, *supra* note 112, at 5.

149. STAFF OF THE J. COMM. ON TAXATION 2006, *supra* note 144, at 68.

150. *Id.*

151. *Id.*

152. *Id.*

153. *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, 2007.¹⁵⁴ In 2008, the Emergency Economic Stabilization Act extended the same provisions through December 31, 2009.¹⁵⁵ 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, 2011.¹⁵⁶ The enhanced deduction expired as scheduled at the end of 2011.¹⁵⁷ 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.¹⁵⁸

One lawmaker in particular, U.S. Sen. Richard Lugar (R-IN) has consistently advocated for permanent adoption of the extension.¹⁵⁹ U.S. Sen. Richard Lugar of Indiana was first elected to the Senate in 1976.¹⁶⁰ He is currently the senior-most Republican in the Senate and is a long-time advocate for hunger issues in the United States.¹⁶¹ As a man from the heartland of America, it is not surprising that he also manages his family's 604-acre farm.¹⁶² 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.

154. Pension Protection Act of 2006, Pub. L. No. 109-280, § 1202, 120 Stat. 780, 1066 (codified at I.R.C. § 170(e)(3)(C)(iv) (2006)).

155. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 323, 122 Stat. 3765, 3874 (codified at I.R.C. § 170(e)(3)(C)(iv) (2008)).

156. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 740, 124 Stat. 3296, 3319 (codified at I.R.C. § 170(e)(3)(C)(iv) (Supp. IV 2010)).

157. 26 U.S.C.A § 170(e)(3)(C)(iv) (West 2011).

158. Good Samaritan Hunger Relief Tax Incentive Extension Act of 2011, S. 166, 112th Cong. § 2 (2011); Good Samaritan Hunger Relief Tax Incentive Extension Act of 2009, S. 1313, 111th Cong. § 2 (2009); Good Samaritan Hunger Relief Tax Incentive Extension Act of 2007, S. 689, 110th Cong. § 2 (2007); Good Samaritan Hunger Relief Tax Incentive Act, S. 94, 109th Cong. § 2 (2005); Good Samaritan Hunger Relief Tax Incentive Act, S. 85, 108th Cong. § 2 (2003); Good Samaritan Hunger Relief Tax Incentive Act, S. 37, 107th Cong. § 2 (2001); Hunger Relief Tax Incentive Act, S. 2084, 106th Cong. § 2 (2000).

159. Press Release, Sen. Richard G. Lugar, Lugar Introduces Good Samaritan Hunger Relief Act (Jan. 25, 2011) [hereinafter Press Release, Lugar Introduces Act], *available at* <http://lugar.senate.gov/news/record.cfm?id=330542&&>.

160. *About Senator Lugar*, RICHARD G. LUGAR, <http://lugar.senate.gov/bio/> (last visited May 1, 2012).

161. *See, e.g.*, Press Release, Sen. Richard G. Lugar, Lugar Receives Hunger Action Reward (June 8, 2010), *available at* <http://lugar.senate.gov/news/record.cfm?id=325527&&> (describing long-time support of hunger issues in receiving award),

162. *About Senator Lugar*, *supra* note 160.

In 2000, Sen. Lugar introduced the Hunger Relief Tax Incentive Act.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.¹⁶⁴ After introduction, the Bill was referred to the Senate Finance Committee where the Bill ultimately died.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.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.¹⁶⁷ This method of calculation addressed the accounting processes of non-corporate donors like S corporations, sole proprietors, and others.¹⁶⁸ What the provision did was effectively create a full fair market value deduction for non-corporate donors.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.¹⁷⁰ To help illustrate this deduction, below is an example of this calculation for an S corporation.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
 x 2

163. Hunger Relief Tax Incentive Act, S. 2084; 146 CONG. REC. 1398 (2000).

164. Hunger Relief Tax Incentive Act, S. 2084, § 2(a).

165. 146 CONG. REC. 1398 (2000).

166. Good Samaritan Hunger Relief Tax Incentive Act, S. 37, § 2.

167. *Id.* § 2(a).

168. *Id.*

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).

170. *Id.*; Good Samaritan Hunger Relief Tax Incentive Extension Act of 2011, 112th Cong. S. 166 § 2 (2011).

171. See Good Samaritan Hunger Relief Tax Incentive Act, S. 37 § 2 (modified calculation example derived from the calculation description).

\$10.00

Total Deduction: \$10.00

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.”¹⁷³ 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.”¹⁷⁴ 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.”¹⁷⁵ 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.”¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ O’Brien spoke extensively about the increased demand for emergency food sources in the United States.¹⁷⁹ 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.”¹⁸⁰ 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.

173. *Id.*, at 2 (statement of Sen. Richard G. Lugar).

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.¹⁸¹ 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.¹⁸² 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.¹⁸³ But, despite bipartisan support and broad backing from numerous national organizations, this Bill also died in committee.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶ Each bill was referred to the Senate Finance Committee where it, in due course, met its untimely death.¹⁸⁷

On January 25, 2011, Sen. Lugar once again introduced the Good Samaritan Hunger Relief Act.¹⁸⁸ 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.”¹⁸⁹ After introduction,

181. *Id.* at 26.

182. *Id.*

183. *Id.*

184. 147 CONG. REC. 206 (2001) (bill introduced by eleven senators representing both the Republican and Democratic parties); *see, e.g., FB Applauds Tax Provision to Encourage Food Donations*, Am. Farm Bureau Fed’n (July 12, 2001), <http://www.fb.org/index.php?action=newsroom.news&year=2001&file=nr0712.html> (indicating industry support for this legislation).

185. I.R.C. § 170(e)(3)(C)(iv) (Supp. IV 2010); *see also* Press Release, Lugar Introduces Act, *supra* note 158.

186. Good Samaritan Hunger Relief Tax Incentive Extension Act of 2009, S. 1313, 111th Cong. (2009); Good Samaritan Hunger Relief Tax Incentive Extension Act of 2007, S. 689, 110th Cong. (2007); Good Samaritan Hunger Relief Tax Incentive Act, S. 94, 109th Cong. (2005); Good Samaritan Hunger Relief Tax Incentive Act, S. 85, 108th Cong. (2003).

187. Good Samaritan Hunger Relief Tax Incentive Extension Act of 2009, S. 1313; Good Samaritan Hunger Relief Tax Incentive Extension Act of 2007, S. 689; Good Samaritan Hunger Relief Tax Incentive Act, S. 94; Good Samaritan Hunger Relief Tax Incentive Act, S. 85.

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 Committee¹⁹⁰—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.¹⁹¹ The general the purpose of PAYGO is “to prevent the enactment of mandatory spending or revenue legislation that would cause or increase a deficit.”¹⁹² 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.”¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ Because the legislation did not garner more support, the enhanced deduction provision for farmers, ranchers, restaurant owners and other small businesses expired last year.¹⁹⁶ 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-

190. Good Samaritan Hunger Relief Tax Incentive Extension Act, S. 166.

191. See S. Con. Res. 21, 110th Cong. § 201 (2007) (enacted).

192. MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., R41408, RULES AND PRACTICES GOVERNING CONSIDERATION OF REVENUE LEGISLATION IN THE HOUSE AND SENATE 15 (2010).

193. *Id.*

194. Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8 (codified at 2 U.S.C. §§ 931–939 (Supp. IV 2010)).

195. See e.g., Pension Protection Act of 2006, Pub. L. No. 109-208, 120 Stat. 780 (codified in scattered sections of 26 U.S.C.).

196. I.R.C. § 170 (e)(3)(C)(iv) (Supp. IV 2010).

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.¹⁹⁷ 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.¹⁹⁸ Unexpectedly, in May 2012, Sen. Lugar lost his Primary Election battle to a Republican challenger.¹⁹⁹ 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.

197. See, e.g., *Encouraging Charitable Giving*, *supra* note 19, at 3, 11, 26 (statements of Sen. Richard G. Lugar & Douglas O'Brien, Director of Pub. Policy & Research, America's Second Harvest) (supporting legislative efforts to expand tax deductions for food donations to all business taxpayers).

198. Sullivan, *supra* note 5.

199. See *Indiana Primary Election Results May 8, 2012*, INDIANA SEC. OF STATE, http://www.in.gov/apps/sos/primary/sos_primary12?page=office&countyID=-1&partyID=-1&officeID=4&districtID=-1&districtshortviewID=-1&candidate=.