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“Charitable Choice” and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses

Michele Estrin Gilman

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Since 1996, Congress has included charitable choice provisions in several social welfare statutes to encourage the participation of religious organizations in administering government-funded social service programs. The current administration has proposed expanding charitable choice programs to allow even greater public funding of private social service providers. In this Article, Professor Michele Gilman discusses the lack of accountability to beneficiaries that occurs when public funds are given to religious organizations for secular programs, and she proposes solutions to this problem. As Professor Gilman explains, doctrines that constrain abuses of governmental discretion, such as administrative procedure acts and constitutional restrictions, generally do not apply when public programs are privatized. Moreover, religious organizations are often insulated from public scrutiny by First Amendment concerns about entangling government in religion, as well as by special immunities from tort liability and limited fiduciary duties for directors. The mechanisms of privatization, such as contracts and vouchers, also fail to ensure that beneficiaries receive quality services.

To ensure that beneficiaries are receiving effective services, Professor Gilman proposes that charitable choice programs be required to adopt a set of measures to improve accountability. These measures enhance accountability by involving beneficiaries in setting clear standards, evaluating outcomes, and enforcing rights to quality services. Finally, Profes-

Professor Gilman analyzes current Supreme Court case law on providing public funding to religious entities, and explains why requiring charitable choice programs to implement accountability measures does not violate the First Amendment Religion Clauses.