



## States can tackle qualified immunity

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Congress is deadlocked on a police reform bill. Whether a compromise emerges before the November election remains to be seen. But in the meantime, there is plenty states can do themselves.

A week ago, Colorado became the first state to make it harder for rogue police officers to use the doctrine of “qualified immunity” as a shelter against misconduct. The legislation isn’t all-encompassing, but it could provide a road map for other states, including Nevada, to make it easier for the victims of police abuse to pursue redress for their grievances.

The Civil Rights Act of 1872 has long allowed citizens who feel their constitutional rights were violated to sue the offending government officials in federal court. But the Supreme Court beginning in 1982 issued a series of rulings that tightened the standards for such legal actions, holding that government agents were protected from liability unless they had violated “clearly established” laws or constitutional rights.

That, in essence, has made it virtually impossible for plaintiffs to prevail unless their case mirrors a previously settled allegation. This has led to myriad absurd outcomes, such as when a federal appeals court last year ruled that two Fresno, California, police officers who allegedly stole \$225,000 while executing a search warrant could not be sued over their sticky fingers.

Critics of qualified immunity had high hopes that the justices this term would add to the docket one of several cases challenging the doctrine. Justice Clarence Thomas has hinted in previous rulings that the concept may be ripe for review. But the justices found no qualified immunity case to their liking, so the federal status quo prevails at least until next year.

But the issue of police reform has become even more controversial in the wake of the death of George Floyd at the hands of Minneapolis police. And, argues Ilya Somin, a George Mason University law professor, there’s no reason — with Congress at a standstill and the high court having taken a pass — that states can’t act take unilateral action, which is exactly what Colorado has done.

The Colorado bill, signed by Gov. Jared Polis on June 19, allows citizens to bring claims in state civil court against police who violate their rights under state law. Those who are victorious will be entitled to legal fees, and officers who are found liable will lose their certification. Colorado thus becomes the first state to “specifically negate the availability of qualified immunity as defense through legislation,” the Cato Institute’s Jay Schweikert writes.

To get around federal qualified immunity protections, other states have also attempted to create an alternative route for citizens to pursue constitutional rights infringements in state court. But “in nearly all of the other states that have passed similar laws,” Mr. Schweikert notes, “state

courts have incorporated a similar or identical version of federal qualified immunity, even when the relevant statute says nothing about it.”

The Colorado law precludes such a possibility, making it more likely that those who have been wronged have a chance for an equitable legal solution.

Mr. Somin notes that the Colorado law does not apply to federal agencies or to state-federal law enforcement partnerships, which often include asset forfeiture teams. That could allow state and local police officers to escape accountability by claiming they were working under the aegis of federal agencies. But “despite these limitations, the measure is an impressive step in the right direction,” Mr. Somin argues, “one that other jurisdictions can learn from.”

Nevada lawmakers will soon be meeting in special session to address a massive coronavirus budget hole. They likely won’t have time during such a limited gathering to tackle other pressing issues. At the very least however, state lawmakers should be prepared to consider such a reform when they reconvene next February. Many of those legislators, Democrats and Republicans, have long obstructed efforts to hold law enforcement more accountable for abuses.

Police officers indeed deserve protections from nuisance claims that stem from their difficult daily duties. But qualified immunity should no longer shield those in law enforcement who commit egregious constitutional violations.