

**PRIVATE PRISONS: CONSTITUTIONAL LITIGATION
AGAINST NON-STATE DEFENDANTS**

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PRIVATE PRISONS: CONSTITUTIONAL LITIGATION AGAINST NON-STATE DEFENDANTS

I. INTRODUCTION

In the last two decades, the use of private prisons increased greatly. Yet, their use has come under increasing public scrutiny, especially regarding the conditions of their facilities, staffing, and treatment of inmates—culminating in the Department of Justice’s decision to reduce (and eventually phase out) their use in the waning days of the Obama Administration. Shortly after being confirmed as President Donald Trump’s first Attorney General, Jeff Sessions rescinded the Obama-era directive to phase out the use of private prisons by the federal government. The initial directive and its subsequent reversal, however, fit into a longer narrative regarding an increased prison population and the reliance by local, state, and federal governments on private companies to provide traditional governmental functions. Accordingly, private prisons sit squarely at the crossroads of big business and constitutional litigation.

This article will first consider the nature of prisons, jails, and private prisons. Second, this article will look at inmate statistics from 1999 through 2015, considering both total inmate population and location. Third, the current conditions of private prisons will be examined, including two of the largest private prison companies in the United States and the impact of the Trump Administration on the companies. This article will then consider the legal rights of prisoners and the current state of § 1983 law and its application against non-state defendants, such as private prisons. Finally, this article will look at the application of the Americans with Disabilities Act, the Rehabilitation Act, and state law negligence claims to private prisons.

II. DEFINITIONS: PRISONS, JAILS, AND PRIVATE PRISONS

“It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones – and South Africa treated its imprisoned African citizens like animals.”

–Nelson Mandela, *Long Walk to Freedom*¹

The conditions of jails and prisons can vary greatly from state-to-state and nation-to-nation. As reflected by the observation of Nelson Mandela, former-President of South Africa, some states (and the conditions of their prisons and jails) are better than others. Even in current-day Texas, issues related to prison conditions are subject to scathing news reports. See, e.g., Jeff Edwards and Scott Medlock, *Air Conditioning is a Human Right*, TIME (July 21, 2016), <http://time.com/4405338/air-conditioning-human-right/> (last visited Apr. 26, 2017) (considering unsafe temperatures in state prisons during the summer heat in Texas); *Judge rules Texas prison must provide inmates with safe-drinking water*, FOX NEWS (June 23, 2016), <http://www.foxnews.com/us/2016/06/23/judge-rules-texas-prison-must-provide-inmates-with-safe-drinking-water.html> (last visited Apr. 26, 2017) (considering unsafe drinking water in Texas state prisons).

Nevertheless, without delving too deeply into the merits of former-President Mandela’s observation, his quotation recognizes the debate over how prisoners should be treated and the conditions of their confinement. As a preliminary matter, however, we need to understand what prisons, jails, and private prisons are. In their loosest sense, laypersons (and even some lawyers) use the words interchangeably. Yet, they convey more information than being mere synonyms. This section will examine the legal definitions of both prisons and jails (and other related terms) and explain how they will be used in this article.

A. Prisons

Simply put, prisons are “[a] building or complex where people are kept in long-term confinement as punishment for a crime, or in short-term detention while waiting to go to court as criminal defendants; specif., a state or federal facility of confinement for convicted criminals, esp. felons.”² *Prisons*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also 72 C.J.S. *Prisons* § 1 (2017) (noting that “[i]n a general sense, the term may include every place of confinement under legal process or lawful arrest, but usually it is applied specifically to the place of confinement of convicted criminals”). Although the term prison can also apply to short-term detention, it is usually applied to designate

¹ NELSON MANDELA, LONG WALK TO FREEDOM 201 (Back Bay Books 1995).

² A felony is “[a] serious crime usu. punishable by imprisonment for more than one year or by death.” *Felony*, BLACK’S LAW DICTIONARY (10th ed. 2014). Examples include burglary, arson, rape, and murder. *Id.* In contrast, a misdemeanor is “[a] crime that is less serious than a felony and is usu. punishable by fine, penalty, forfeiture, or confinement (usu. for a brief term) in a place other than prison (such as a county jail).” *Misdemeanor*, BLACK’S LAW DICTIONARY (10th ed. 2014).

institutions that hold persons convicted of more serious crimes, such as felonies. *See* 72 C.J.S. *Prisons* § 1 (2017). Many states (in Texas through the Texas Department of Criminal Justice) and the federal government (through the Federal Bureau of Prisons) operate and manage their own prisons.³ *See State Prison*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Federal Prison*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Under federal statute, the United States may contract with local authorities for the imprisonment, subsistence, care, and proper employment of federal prisoners. *See* 18 U.S.C. § 4002; *see also* 72 C.J.S. *Prisons* § 3 (2017) (noting that state jails lawfully used by the United States may be deemed to be a jail of the United States and that the jails personnel may be deemed officials of the United States or an officer of the federal court, but that county jails housing federal prisoners are generally not considered a federal institution and that the jails personnel are not ordinarily considered officers of the United States). Because the term “prison” is usually applied to institutions designed for long-term confinement of persons already *convicted* of more serious crimes, this article will limit the term’s use to that context only, unless otherwise expressly stated.

B. Jails

Jails are “[a] prison; esp., a local government’s detention center where persons awaiting trial or those convicted of misdemeanors are confined.” *Jail*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* 72 C.J.S. *Prisons* § 1 (2017) (noting “It generally is a prison appertaining to a county or municipality, in which are confined for punishment persons convicted of misdemeanors committed in the county or municipality”). Because the term is usually applied to local government detention centers for people awaiting trial or already convicted of misdemeanors, the term “jail” will be used in this article to refer to those facilities.

C. Private Prisons

Private prisons are penal or detention facilities operated by private companies for profit under a contract from the government with private employees serving as correctional staff and guards. *Private Prisons*, BLACK'S LAW DICTIONARY (10th ed. 2014). Private detention operations can occur at the local, state, and federal levels, and in both jail and prisons facilities. *See id.* Additionally, the extent of the private operations can range from some form of management assistance to full operation of detention facilities. *See id.*

Substantial private investment in the construction and management of jails and prisons began in the mid-1980s.⁴ *Developments in the Law, A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1869 (2002). The use of private prisons was part of an overall trend of privatization in many areas of traditional government function,⁵ together with an “exploding prison populations resulting from stricter drug and immigration laws and changes in sentencing procedures.” *Id.* at 1869 & nn.4-5; *see also Wendy Netter Epstein, Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2213-14 & nn.4-9 (2013) (noting that “[g]overnments now contract with private companies to run public schools, operate prisons, place foster children, administer welfare benefits, and provide military services and border control, among myriad other examples”) (citing multiple law review articles). Two of the largest private prisons companies in the United States, CoreCivic (formerly Corrections Corporation of America) and Geo Group, will be considered in more detail in the section regarding the current state of private prisons in the United States.

III. PRISON STATISTICS

“The founders of a new colony, whatever Utopia of human virtue and happiness they might originally project, have invariably recognized it among their earliest practical necessities to allot a portion of the virgin soil as a cemetery, and another portion as the site of a prison.”

—Nathaniel Hawthorne, *The Scarlet Letter*⁶

³ For more information see TEXAS DEPARTMENT OF CRIMINAL JUSTICE, www.tdcj.state.tx.us (last visited Apr. 26, 2017) and FEDERAL BUREAU OF PRISONS, www.bop.gov (last visited Apr. 26, 2017) (last visited Apr. 26, 2017).

⁴ For a detailed history of the emergency of the modern private prison, see Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450-62 (2005).

⁵ Government function is defined as “[a] government agency’s conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public.” *Government Function*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that activities of police or firefighters are usually considered governmental in the sense that they involve the kind of power expected of the government) (citation omitted).

⁶ NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 28 (Millennium Publications 2015).

This section will look at the growth of the prison populations in the United States from 1999 to 2010, both in terms of total inmates and percentages housed in private prisons. Then, the statistical information regarding several states, including Texas, will be considered and compared to available statistics from 2015.

A. 1999 to 2010

In 1999, the total prison population in the United States was 1,366,721. Cody Mason, *Too Good to be True: Private Prisons in America*, THE SENTENCING PROJECT, at 1 (January 2012), available at <http://sentencingproject.org/wp-content/uploads/2016/01/Too-Good-to-be-True-Private-Prisons-in-America.pdf> (last visited Apr. 26, 2017). By 2010, the number of total prison population in the United States had increased to 1,612,395. *Id.* Stated differently, the total prison population in the United States had increased by 245,674 inmates or approximately 18%. *Id.* During that same period, however, the private prison population increased by 80% overall in the United States, including a 40% increase in state prisons and by 784% in federal prisons. *Id.* This increase is reflected more fully in the following chart.

	1999	2010	Percentage Change
Total Prison Population	1,366,721	1,612,395	+18%
Total Private	71,208	128,195	+80%
Federal Private	3,828	33,839	+784%
State Private	67,380	94,365	+40

*Id.*⁷

The increase in the private prison population from 1999 to 2010 was not consistent from state-to-state, however. *See id.* at 4-5 (referring to chart of private prison population for 1999 to 2010). For example, as illustrated by the following chart, some states consistently did not utilize private prisons, others greatly decreased their use, and others states (like Texas) substantially increased their use from 1999 to 2010. *See id.* Generally, southern states (e.g., Florida and Texas) showed a more consistent reliance on the use of private prisons than other regions during this period. *See id.*

Jurisdiction	Number in Private Prisons		Percentage Change	Percentage of Population		Percentage Change
	1999	2010		1999	2010	
California	4,621	2,170	-53%	2.8%	1.3%	-54%
Florida	3,773	11,796	213%	5.4%	11.3%	109%
Louisiana	3,080	2,921	-5%	9%	7.4%	-18%
Minnesota	80	0	-100%	1.3%	0	-100%
New Mexico	1,873	2,905	55%	38.6%	43.6%	13%
New York	0	0	-	0	0	-
Oklahoma	6,228	6,019	-3%	27.8%	22.9%	-18%
South Dakota	46	5	-89%	1.8%	0.1%	-94%
Texas	11,653	19,155	64%	7.1%	11%	55%
Federal	3,828	33,830	784%	2.8%	16.1%	475%
States	67,380	94,365	40%	5.5%	6.8%	24%
States and Federal	71,208	128,195	80%	5.2%	8%	54%

*Id.*⁸

In 2010, the number of inmates held in private prisons ranged from five in South Dakota to 19,155 in Texas, the largest population by total inmates. *Id.* at 5. After Texas, Florida had the second-largest population total with 11,000 inmates. *Id.* The percentages of both states were less than 25% in 2010, however. *See id.* at 4-5. By percentage, New Mexico had the highest percentage of private prison inmates in both 1999 and 2010, with 39% and 44%, respectively. *Id.* at 6. In sum, the chart shows a general, substantial increase from 1999 to 2010. But the chart also shows that the

⁷ This chart was taken from Mason, *Too Good to be True: Private Prisons in America*, THE SENTENCING PROJECT, at 1.

⁸ This chart is an abridged version of a full 50 state analysis that can be found in Mason, *Too Good to be True: Private Prisons in America*, THE SENTENCING PROJECT, at 4-5.

increase was not consistent across all of the states, with southern states showing a greater support for their use than other regions in the United States.

B. 2015

The most recent publicly available statistical information for the private prison population in the United States was from 2015. Abigail Geiger, *U.S. private prison population has declined in recent years*, PEW RESEARCH CENTER (April 11, 2017), <http://www.pewresearch.org/fact-tank/2017/04/11/u-s-private-prison-population-has-declined-in-recent-years/> (last visited Apr. 26, 2017) (relying on information from the Bureau of Justice Statistics' national prisoner statistics). In 2015, there were 126,000 prisoner held in privately operated facilities in the United States, including 29 states and the Federal Bureau of Prisons—approximately an 83% increase since 1999. *Id.* For comparison, during that same time period, however, the total prison population in the United States increased by only 12%. *Id.* Additionally, the federal private prisons population (excluding those held in immigration detention facilities) increased from 3,828 in 1999 to 34,934 in 2015. *Id.* Nevertheless, the 2015 private prison total was a decrease from the 2010 numbers previously discussed and their all-time high. *Id.*

Moreover, in 2015, although still the largest of any state, Texas had only 14,293 inmates under state jurisdiction held in private prisons—less than its 2010 total of 19,155. *See id.* Texas was followed closely by Florida with 12,487 inmates in private prisons and then Georgia with 7,953 inmates, Oklahoma with 7,446 inmates, and Arizona with 6,471 inmates under state jurisdiction in private prisons. *Id.* This decrease, however, occurred during the Obama Administration, which adopted a less favorable position to private prisons than the current Trump Administration. As noted, one of the first actions of Attorney General Sessions was to reverse a directive from the Obama Administration to phase out work with private prisons at the federal level. Accordingly, it is probable that private prisons will continue to operate at least at their current level, if not increase in total numbers during the current administration. More specifics of the current state of private prisons will be provided in the next sections, including looking at two of the largest private prison companies.

IV. CURRENT STATUS OF PRIVATE PRISONS IN THE UNITED STATES

“A prison taint was on everything there. The imprisoned air, the imprisoned light, the imprisoned damps, the imprisoned men, were all deteriorated by confinement. As the captive men were faded and haggard, so the iron was rusty, the stone was slimy, the wood was rotten, the air was faint, the light was dim. Like a well, like a vault, like a tomb, the prison had no knowledge of the brightness outside; and would have kept its polluted atmosphere intact, in one of the spice islands of the Indian Ocean.”

—Charles Dickens, *Little Dorrit*⁹

This section will look at the current state of private prison use in the United States. Specifically, it will consider the two largest private prison operators in the United States—CoreCivic and Geo Group—and the impact of Donald Trump's election.

A. CoreCivic

Founded in 1983, CoreCivic (formerly Corrections Corporation of America) (CCA) is a publicly traded company that manages correctional facilities for federal, state, and local governments in the United States. CORCECIVIC, www.cca.com (last visited Apr. 26, 2017). It has facilities located in 20 states, including 18 facilities located in Texas, and manages more than 40% of all adult-secure beds under contract with the United States. *Id.* CoreCivic's facilities in Texas are located in Del Valle, Corpus Christi, Dallas, El Paso, Fort Worth, Bartlett, Henderson, Bridgeport, Eden, Houston, Laredo, Jacksboro, Dilley, Taylor, and Raymondville. *Id.* CCA currently houses nearly 70,000 inmates in more than 70 facilities nationwide. *Id.* According to its website, it is the fifth-largest corrections system in the nation, behind only the federal government and three states. *Id.* In 2015, CCA reported \$1.9 billion in revenue and more than \$221 million in net income in 2015. *The Corrections Corporation of America, by the Numbers*, MOTHER JONES (June 23, 2016), <http://www.motherjones.com/politics/2016/06/cca-corrections-corporation-america-private-prisons-company-profile> (last visited Apr. 26, 2017).

Nevertheless, CCA has a long history of lawsuits, including 1,200 cases that have been publicly disclosed. *Id.* Of those cases, the subject of the suits were as follows: sexual harassment (2.8%), death (3.2%), sexual assault (3.7%), use of force (4.2%), physical assault (5%), work-related (8.6%), medical care (14.9%), injuries (15%) and civil rights/prison conditions (16.1%). *Id.* Additionally, between 2010 and 2015, prisoners filed 82 percent of the more

⁹ CHARLES DICKENS, *LITTLE DORRIT* 16-18 (Penguin Classics, Penguin Books 2003).

than 1,000 federal civil cases filed against CCA. *Id.* Other lawsuits brought against CCA have related to the conditions of their prisons and allegations that poor management and chronic understaffing have led to unsafe conditions for the inmates. *See, e.g.,* Rebecca Boone, *Private prison company CCA to face trial in violence lawsuit*, U.S. NEWS (July 7, 2016), <https://www.usnews.com/news/us/articles/2016-07-07/private-prison-company-cca-to-face-trial-in-violence-lawsuit> (last visited Apr. 26, 2017).

B. GEO Group

Similarly, The GEO Group, Inc. (GEO) “provides complementary, turnkey solutions for numerous government partners worldwide across a spectrum of diversified correctional and community reentry services.” THEGEOGROUP, INC., www.geogroup.com (last visited Apr. 26, 2017). Its operations include the management and/or ownership of 143 correctional, detention, and community reentry facilities encompassing approximately 100,000 beds, including idle beds in inventory and projects under development. *Id.* Specifically, GEO has 74 United States corrections facilities with 80,555 beds, seven international services facilities with 7,861 beds, 50 residential reentry facilities with 10,321 beds, 61 day reporting centers, and 12 youth services residential facilities with 1,267 beds. *Id.* Of those 74 facilities, four are located in Texas, including San Antonio, Odessa, Big Lake, and Pearsall. *Id.* Internationally, GEO has facilities in Scotland, South Africa, and Australia. *Id.* Additionally, it has reported an increase in revenue over the last five years from \$1.48 billion in 2012 to \$2.18 billion in 2016. *See Annual Financials for GEO Group Inc.*, MARKET WATCH (Apr. 26, 2017, 11:23 AM), www.marketwatch.com/investing/stock/GEO/financials (last visited Apr. 26, 2017).

C. Trump Administration Impact

As noted, in the waning days of the Obama Administration, the Department of Justice announced that it intended to phase out the Federal Bureau of Prisons’ reliance on private prisons by declining to renew or substantially reduce the scope of its contracts with private prison companies, including CCA and GEO. OFFICE OF THE DEPUTY ATTORNEY GENERAL, U.S. DEP’T OF JUSTICE, REDUCING OUR USE OF PRIVATE PRISONS (Aug. 18, 2016), *available at* www.justice.gov/archives/opa/file/886311/download (last visited Apr. 26, 2017). Specifically, then-Deputy Attorney General Sally Yates noted:

For the first time in decades, the federal prison population has begun to decline, from nearly 220,000 inmates in 2013 to fewer than 195,000 inmates today. . . . Private prisons served an important role during a difficult period, but time has shown that they compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of Inspector General, they do not maintain the same level of safety and security. The rehabilitative services that the Bureau provides, such as education programs and job training, have proved difficult to replicate and outsource—and these services are essential to reducing recidivism and improving public safety. . . . For all of these reasons, [the Department of Justice is] beginning the process of reducing—and ultimately ending—[its] use of privately operated prisons.

Id. During his first month in office, however, Attorney General Sessions rescinded the earlier guidance to phase out private prison contracts. In changing the Department of Justice’s approach, he stated that his decision was meant to “restore [the Bureau of Prisons’] flexibility to manage the federal prison inmate population based on capacity needs.” Laura Jarrett, *Jeff Sessions New Era for DOJ*, CNN (Apr. 13, 2017, 10:04 AM), www.cnn.com/2017/04/13/politics/jeff-sessions-new-era-for-doj/ (last visited Apr. 26, 2017). Unsurprisingly, the election of President Trump and Attorney General Sessions’s actions have greatly increased the stock price of both CCA and GEO. *See* Heather Long, *Private prison stocks up 100% since Trump’s win*, CNN MONEY (Feb. 24, 2017, 2:07 PM), <http://money.cnn.com/2017/02/24/investing/private-prison-stocks-soar-trump/> (last visited Apr. 26, 2017) (noting “The stocks of the two biggest private prison operators -- CoreCivic (formerly known as Corrections Corp. of America) and Geo Group -- have doubled since election day. CoreCivic (CXW) is up 140% since Trump won in November; Geo Group (GEO) has risen 98%.”).

In sum, private prison operation is big business in the United States. The Department of Justice has recognized their limitations, however—including that they do not provide the same level of correctional services, programs, and resources as Federal Bureau of Prison facilities; they do not save substantially on costs; and that they do not maintain the same level of safety and security. These were the reasons the Department of Justice decided to phase out their use over time.

V. RIGHTS OF PRISONERS AND LIMITATIONS

*Oh, the inmates and the prisoners
I found they were my kind
And it was there inside the bars
I found my peace of mind
But the jails they were too crowded
Institutions overflowed
So they turned me loose to walk upon
Life's hurried tangled road*

–Bob Dylan, *Ballad of Donald White*¹⁰

A. General Standard

The Supreme Court has clearly noted that prison inmates retain certain constitutional rights, even when incarcerated. *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). But the very circumstance of confinement coupled with the legitimate goals and policies of the penal institution subjects those rights to restrictions and limitations. *Id.* at 546 (citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)); see *Price v. Johnston*, 334 U.S. 266, 285 (1948) (“Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”). Simply put, a prisoner “is not free to do that which he might wish to do, nor may he do allowable things at a time and in a manner he might prefer.” *Muhammad v. Lynaugh*, 966 F.2d 901, 902 (5th Cir. 1992). Accordingly, a prisoner’s constitutional rights may be limited by policies, but only to the extent necessary to further a penal institution’s legitimate goals. See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).¹¹

Several factors are relevant in determining whether a prison regulation infringes on an inmate’s constitutional rights: (1) is there a valid, rational correlation between the prison regulation and the legitimate governmental interest advanced; (2) are there alternative means of exercising the rights that remain available to the inmates; and (3) what is the impact of an accommodation in favor of the inmate on prison staff, other inmates, and the allocation of prison resources generally. *Muhammad*, 966 F.2d at 902; see *Latoya v. Villegas*, No. 1:12-CV-085-C, 2013 WL 4774635, at *3 (N.D. Tex. Sept. 6, 2013) (citing *Muhammad*, 966 F.2d at 902). And the constitutional rights of the inmate must be weighed against the institution’s needs and its objectives that are promoted by any restriction. *Id.* (citing *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989)). As explained by the Fifth Circuit, a court will accord “great deference to prison administrators’ judgments regarding jail security.” *Oliver v. Scott*, 276 F.3d 736, 745 (5th Cir. 2002).

B. Turner Factors

Traditionally, courts review prison policies that impinge on fundamental constitutional rights¹² under the deferential standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007); see also *Madison v. Riter*, 355 F.3d 310, 314 & n.1 (4th Cir. 2003) (noting that the *Turner* factors represent the traditional deference afforded to prison regulations that impose burdens on prisoners’ rights, but that legislative action has created greater protection in certain areas).

Under *Turner*, prison regulations that impinge on an inmate’s constitutional rights are valid if the regulation was reasonably related to a legitimate penological interest. *Id.* (citing *Turner*, 482 U.S. at 89). *Turner* requires the court to consider four factors:

- (1) whether a valid and rational connection exists between the prison regulation and the legitimate governmental interest put forward to justify it;
- (2) whether there are alternative means of exercising the right that remain open to prison inmates;

¹⁰ Bob Dylan, *Ballad Of Donald White*, BOB DYLAN, SONY MUSIC ENTERTAINMENT, <https://bobdylan.com/songs/ballad-of-donald-white/> (last visited Apr. 26, 2017).

¹¹ Penology is “[t]he study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals, including the art of fitting the right treatment to an offender.” *Penology*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹² In constitution law, a fundamental right is “[a] significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications. A fundamental right triggers strict scrutiny to determine whether the law violates the Due Process Clause or the Equal Protection Clause of the 14th Amendment. As enunciated by the Supreme Court, fundamental rights include voting, interstate travel, and various aspects of privacy (such as marriage and contraception rights).” *Fundamental Right*, BLACK’S LAW DICTIONARY (10th ed. 2014).

- (3) the impact of the accommodation on prison guards, other inmates, and the allocation of prison resources generally; and
- (4) whether there are “ready alternatives” to the regulation in question.¹³

Id. (citing *Turner*, 482 U.S. at 89-90). “A court ‘must determine whether the government objective underlying the regulation at issue is legitimate and neutral, and that the regulations are rationally related to that objective.’”¹⁴ *Freeman v. Texas Dep’t of Criminal Justice*, 369 F.3d 854, 860 (5th Cir. 2004) (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 414-15 (1989)); accord *Scott v. Miss. Dep’t of Corr.*, 961 F.2d 77, 80-81 (5th Cir. 1992) (explaining that a court need not “weigh evenly, or even consider, each of these factors,” as rationality is the controlling standard).

VI. SECTION 1983

“The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.”

–Charles Dickens, *Bleak House*¹⁵

Multiple, thick legal tomes and treatises could be (and in many cases actually have been) written on § 1983 law. Moreover, countless opinions in both trial and appellate courts have been written in this area as well. Simply put, it is too complex to explain here in detail. Accordingly, this section will generally look at the basis of § 1983 and how it applies to both private prisons and employees of private prisons. Additionally, it will explain the rationale of courts in refusing to expand *Bivens* law to private prisons.

A. Legal Standard

Section 1983 “provides a federal cause of action for the deprivation, under color of law, of a citizen’s ‘rights, privileges, or immunities secured by the Constitution and laws’ of the United States.” *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994) (citing 42 U.S.C. § 1983). It “afford[s] redress for violations of federal statutes, as well as of constitutional norms.” *Id.* (citing *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)). To state a claim under § 1983, a plaintiff must allege facts that show (1) he or she has been deprived of a right secured by the Constitution and the laws of the United States; and (2) the deprivation occurred under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005).

As explained by the Supreme Court:

A moment’s reflection will clarify the essential distinction between the two elements of a § 1983 action. Some rights established either by the Constitution or by federal law are protected from both governmental and private deprivation. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-424, 88 S.Ct. 2186, 2194,

¹³ Although the factors require that ready alternatives be considered, the Supreme Court rejected the application of the least restrictive means standard to inmates’ First Amendment free exercise claims in *Turner*. *See Turner*, 482 U.S. at 90-91. The Supreme Court explained:

This is not a “least restrictive alternative” test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Id. (citations omitted); *see also Freeman*, 369 F.3d at 857 n.1 (considering standing).

¹⁴ State and local prison regulations that burden prisoners’ religious exercise have been subject to the rational-relationship test, as outlined in *Turner*, by federal courts. *See Freeman*, 369 F.3d at 860; *Madison*, 355 F.3d at 314 n.1 (citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50 (1987)). In considering a free exercise case, the Fifth Circuit has noted that the pertinent question was not whether an inmate was denied a specific religious accommodation, but whether, more broadly, the prison afforded the inmate opportunities to exercise his or her faith. *Freeman*, 369 F.3d at 861 (citing *Goff v. Graves*, 362 F.3d 543, 549 (8th Cir. 2004) (“The critical question for *Turner* purposes is whether the prison officials’ actions deny prisoners their free-exercise rights without leaving open sufficient alternative avenues for religious exercise.”)). But, as noted, legislative action, such as through the enactment of the Religious Freedom Restoration Act, has created greater protection in certain areas. *Id.* at 314 & n.1.

¹⁵ CHARLES DICKENS, *BLEAK HOUSE* 621 (Penguin Classics, Penguin Books 2003).

2195, 20 L.Ed.2d 1189 (1968) (discussing 42 U.S.C. § 1982). Although a private person may cause a deprivation of such a right, he may be subjected to liability under § 1983 only when he does so under color of law. *Cf.* 392 U.S., at 424-425 and n.33, 88 S.Ct. at 2195. However, most rights secured by the Constitution are protected only against infringement by governments. *See, e.g., Jackson*, 419 U.S., at 349, 95 S.Ct., at 452; Civil Rights Cases, 109 U.S. 3, 17-18, 3 S.Ct. 18, 25-26, 27 L.Ed. 835 (1883).

Flagg Bros., Inc., 436 U.S. at 156.

Section 1983 does not apply when federal action is at issue, however. *See Williams v. Wood*, 612 F.2d 982, 984 n.1 (5th Cir. 1980). When a plaintiff alleges unconstitutional action by a *federal* actor, his or her claims arise under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and not § 1983. *Bivens* is “the counterpart to 42 U.S.C. § 1983,” and it extends the protections afforded under § 1983 to parties injured by federal actors. *Chapman v. United States*, No. 4:06-CV-0426-Y, 2006 WL 3831227, at *1 n.8 (N.D. Tex. Dec. 27, 2006); *see also Izen v. Catalina*, 398 F.3d 363, 367 n.3 (5th Cir. 2005). “A *Bivens* action is analogous to an action under § 1983—the only difference being that § 1983 applies to constitutional violations by state, rather than federal, officials.” *Evans v. Ball*, 168 F.3d 856, 863 n.10 (5th Cir. 1999), *overruled on other grounds, Castellano v. Fragozo*, 352 F.3d 939, 948-49 & n. 36 (5th Cir. 2003). Accordingly, the Fifth Circuit does not distinguish between *Bivens* and § 1983 claims. *Starks v. Hollier*, 295 F. App’x 664, 665 (2008) (per curiam) (citing *Izen v. Catalina*, 398 F.3d 363, 367 n.3 (5th Cir. 2005); *see Stephenson v. Reno*, 28 F.3d 26, 27 (5th Cir. 1994) (citation omitted) (noting that a *Bivens* claim “parallel[s] the analysis used to evaluate state prisoner’s § 1983 claims”).

B. Application to Non-State Defendants

As noted, § 1983 requires a deprivation “under color of state law.” *Flagg Bros., Inc.*, 436 U.S. at 156. The Supreme Court has recognized a number of different types of situations in which the “under color of state law” or “state action” requirement was met. *Roberts v. Louisiana Downs*, 742 F.2d 221, 223 (5th Cir. 1984). For example, the Supreme Court has held that when a state was so heavily involved in an activity with a private party that it was in essence a joint participant, the “symbiotic relationship” was sufficient to make the actions of the private party attributable to the state. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Additionally, state action can also found when powers “traditionally the exclusive prerogative of the state” were delegated to a private party. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In essence, the required connection was found to be present when a state had compelled an action or “provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *accord Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

The Fifth Circuit has explained that it is not a mechanical application to determine whether there was state action, however. *Roberts*, 742 F.2d at 224. Instead:

State action may manifest itself in a wide variety of forms, some of which do not fit neatly in any category. In essence, for a nominally private individual’s conduct to meet the state action requirement, there must be a sufficiently close connection between the state and the challenged conduct for the actor to be treated as an agent of the state, or the conduct to be attributed to the state. *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982). This essentially factual determination is made by “sifting facts and weighing circumstances case by case” to determine if there is a sufficient nexus between the state and the particular aspect of the private individual’s conduct which is complained of. *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 611 (5th Cir.1980), citing *Burton v. Wilmington Parking Authority*, 365 U.S. at 722, 81 S.Ct. at 860, 6 L.Ed.2d at 45. The inquiry in this case, then, is whether state regulation and control of horseracing was so intimately involved with the decision to deny Roberts stall space that this action should be attributed to the state.

Id. Accordingly, whether a private party may be liable under § 1983 is fact specific.

1. Private Prison Companies

In *Braswell v. Corr. Corp. of Am.*, 419 F. App’x 662 (6th Cir. 2011), the Sixth Circuit considered the applicability of § 1983 liability to CCA—one of the two private prison companies previously discussed within this article. In *Braswell*, the court explained that a private corporation that performs the *traditional state function* of operating a prison acts under color of *state law* for purposes of § 1983. *Id.* (citing *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996)). The court found, however, that CCA (or another private prison company) could not be held liable under a

theory of *respondeat superior*,¹⁶ however. *Id.* (citing *Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658, 691-92 (1978)). Accordingly, to prevail in a § 1983 action against a private prison, a plaintiff must show that a policy or well-settled custom of the company was the “moving force” behind the alleged deprivation of his or her rights. *Id.* (citing *Miller v. Sanilac*, 606 F.3d 240, 254-55 (6th Cir. 2010)).

As noted, § 1983 requires a deprivation “under color of state law.” *Flagg Bros., Inc.*, 436 U.S. at 156. Thus, this standard (and § 1983 law in general) only applies to private prisons operating in place of a state—not the federal government. As also noted, the equivalent to a § 1983 claim against the federal government is a *Bivens* claim. *Stephenson*, 28 F.3d at 27 (noting that a *Bivens* claim “parallel[s] the analysis used to evaluate state prisoners § 1983 claims”). As will be explained in a later section, *Bivens* against private prison operators are treated differently.

2. Employees of Private Prisons

In most § 1983 cases, qualified immunity is an issue raised by individual defendants. *See Duckett v. City of Cedar Park*, 950 F.2d 272 (5th Cir. 1992). Qualified immunity shields government officials performing discretionary functions “from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.” *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see also Qualified Immunity*, BLACK’S LAW DICTIONARY (10th ed. 2014). When sued in their individual capacities, governmental employees are entitled to a presumption of qualified immunity from suit. *Kesler v. King*, 29 F. Supp. 2d 356, 367 (S.D. Tex. 1998). Being subject to suit under § 1983 does not mean that a party has the right to assert qualified immunity, however. *Harrison v. Ash*, 539 F.3d 510, 521 (6th Cir. 2008). Although § 1983 “creates a species of tort liability that on its face admits of no immunities,” *Wyatt v. Cole*, 504 U.S. 158, 163 (1992), the Supreme Court has carved out areas of immunity from suit where the “tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that ‘Congress would have specifically so provided had it wished to abolish the doctrine.’” *Id.* at 164 (citations omitted).

Accordingly, in *Richardson v. McKnight*, 521 U.S. 399 (1997), the Supreme Court considered whether prison guards employed by a privately-retained company to manage a state prison facility were entitled to qualified immunity in a § 1983 case. *Id.* at 412. The Supreme Court in *Richardson* provided a complex framework for determining whether private actors were entitled to qualified immunity on a case-by-case basis. *See id.* Under the framework, courts were required to (1) determine whether there was a “historical tradition of immunity” for the conduct that gave rise to liability and (2) consider the policies and purposes that underlie government employee immunity to determine whether those same purposes support extending immunity to the private actor. *Id.* at 404, 408-11. Ultimately, however, the Supreme Court held that qualified immunity was *not* available to prison guards who worked for a private, for a profit corporation that was under contract with the state to manage a prison. *Id.*; *see also Duncan v. Peck*, 844 F.2d 1261, 1264 (6th Cir. 1988) (finding that private parties are not eligible for immunity from suit based on common law practices and policy rationales). Accordingly, employees of private prisons can be liable under § 1983.

3. Recognized Claims

With varying degrees of success, prisoners have brought the following § 1983 claims against corporations operating prisons or their employees:

1. Disciplinary action—challenge to punishment. *See, e.g., Smith v. Corr. Corp. of Am.*, 5 F. App’x 443 (6th Cir. 2001); *Barkus v. Kaiser*, 229 F.3d 1162, 2000 WL 1346226 (10th Cir. 2000); *Byrd v. Cornell Corr., Inc.*, 60 F. App’x 191 (10th Cir. 2003).
2. Challenge of process. *See, e.g., Smith v. Corr. Corp. of Am.*, 5 F. App’x 443 (6th Cir. 2001); *Griffin v. Lopez*, 230 F.3d 1366 (9th Cir. 2000).
3. Excessive force. *See, e.g., Roberson v. Thomas*, No. 3:00-CV-2326-M, 2001 WL 391598 (N.D. Tex. Apr. 17, 2001), *adopted by* 2001 WL 493139 (N.D. Tex. May 7, 2001).
4. Failure to properly select, train, or supervise prison employees. *See, e.g., Roberson v. Thomas*, No. 3:00-CV-2326-M, 2001 WL 391598 (N.D. Tex. Apr. 17, 2001), *adopted by* 2001 WL 493139 (N.D. Tex. May 7, 2001); *Kesler v. King*, 29 F. Supp. 2d 356 (S.D. Tex. 1998); *Jones v. Barry*, 33 F. App’x 967 (10th Cir. 2002); *Citrano v. Allen Corr. Ctr.*, 891 F. Supp. 312 (W.D. La. 1995).

¹⁶ *Respondeat Superior* [Law Latin “let the superior make answer”] is defined as “[t]he doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.” *Respondeat Superior*, BLACK’S LAW DICTIONARY (10th ed. 2014).

5. Failure to protect from other inmates. See, e.g., *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 1996 (6th Cir. 1996); *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508 (6th Cir. 2001); *Luong v. Hatt*, 979 F. Supp. 481 (N.D. Tex. 1997); *Peoples v. CCA Det. Ctr.*, 2004 WL 74317 (D. Kan. 2004).
6. Failure to provide adequate food and water. See, e.g., *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508 (6th Cir. 2001); *Ferrell v. NCDIOC*, No. CA-01-771-H, 2001 WL 34013609 (E.D.N.C. Dec. 26, 2001), *aff'd*, 33 F. App'x 114 (4th Cir. 2002); *Sledge v. Dawson State Jail*, No. 3:03-CV-202-R, (N.D. Tex. June 24, 2003), *adopted by* 2003 WL 21751246 (N.D. Tex. July 28, 2003), *aff'd*, 91 F. App'x 931 (5th Cir. 2004) (per curiam).
7. Failure to provide adequate living conditions. See, e.g., *Sledge v. Dawson State Jail*, No. 3:03-CV-202-R, (N.D. Tex. June 24, 2003), *adopted by* 2003 WL 21751246 (N.D. Tex. July 28, 2003), *aff'd*, 91 F. App'x 931 (5th Cir. 2004) (per curiam); *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508 (6th Cir. 2001); *Griffin v. Lopez*, 230 F.3d 1366 (9th Cir. 2000); *Satz v. Corr. Corp. of Am., Inc.*, 43 F. App'x 64 (9th Cir. 2002); *James v. Wiley*, 125 F.3d 862, 1997 WL 606985 (10th Cir. 1997).
8. Failure to provide legal materials or access to courts. See, e.g., *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100 (6th Cir. 1991); *Heitzman v. Fields*, 145 F.3d 1331, 1998 WL 211814 (6th Cir. 1998); *Horton v. Corr. Corp. of Am.*, 187 F.3d 635, 1999 WL 623769 (6th Cir. 1999); *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508 (6th Cir. 2001); *Griffin v. Lopez*, 230 F.3d 1366 (9th Cir. 2000); *Satz v. Corr. Corp. of Am., Inc.*, 43 F. App'x 64 (9th Cir. 2002).
9. Failure to provide medical care. See, e.g., *Jones v. Barry*, 33 F. App'x 967 (10th Cir. 2002); *Lindsey v. Bowlin*, 557 F. Supp. 2d 1225 (D. Kan. 2008); *Smith v. Corr. Corp. of Am., Inc.*, 674 F. Supp. 2d 201 (D.D.C. 2009); *Citrano v. Allen Corr. Ctr.*, 891 F. Supp. 312 (W.D. La. 1995); *Palm v. Marr*, 174 F. Supp. 2d 484 (N.D. Tex. 2001); *Sledge v. Dawson State Jail*, No. 3:03-CV-202-R, (N.D. Tex. June 24, 2003), *adopted by* 2003 WL 21751246 (N.D. Tex. July 28, 2003), *aff'd*, 91 F. App'x 931 (5th Cir. 2004) (per curiam); *Willis v. U.S. Corr. Corp.*, 77 F.3d 483, 1996 WL 61797 (6th Cir. 1996); *Horton v. Corr. Corp. of Am.*, 187 F.3d 635, 1999 WL 623769 (6th Cir. 1999); *Lewis v. Aramark Servs., Inc.*, 238 F.3d 422, 2000 WL 1827847 (6th Cir. 2000); *Johnson v. Corr. Corp. of Am.*, 26 F. App'x 386 (6th Cir. 2001); *Wright v. Sapp*, 59 F. App'x 799 (6th Cir. 2003), *cert. denied*, 540 U.S. 970 (2003); *Bowman v. Corr. Corp. of Am.*, 350 F.3d 537 (6th Cir. 2003); *Satz v. Corr. Corp. of Am., Inc.*, 43 F. App'x 64 (9th Cir. 2002); *James v. Wiley*, 125 F.3d 862, 1997 WL 606985 (10th Cir. 1997); *Gabriel v. Corr. Corp. of Am.*, 211 F. Supp. 2d 132 (D.D.C. 2002).
10. First Amendment—Free Exercise Clause. See, e.g., *Coronel v. Paul*, 316 F. Supp. 2d 868 (D. Ariz. 2004).
11. First Amendment—Speech and Association Clause. See, e.g., *Purkey v. CCA Det. Ctr.*, 339 F. Supp. 2d 1145 (D. Kan. 2004).
12. Loss of money or property. See, e.g., *Montgomery v. Kaiser*, 210 F.3d 390, 2000 WL 374279 (10th Cir. 2000); *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508 (6th Cir. 2001).
13. Loss of prison job. See, e.g., *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508 (6th Cir. 2001); *Cox v. Ashcroft*, 603 F. Supp. 2d 1261 (E.D. Cal. 2009).
14. Nondisciplinary placement in segregation. See, e.g., *James v. Wiley*, 125 F.3d 862, 1997 WL 606985 (10th Cir. 1997); *Vestar v. Hudson*, 216 F.3d 1086, 2000 WL 702872 (10th Cir. 2000).
15. Restriction on reading materials. See, e.g., *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100 (6th Cir. 1991).
16. Retaliation. See, e.g., *Griffin v. Lopez*, 230 F.3d 1366, 2000 WL 1228997 (9th Cir. 2000); *Heitzman v. Fields*, 145 F.3d 1331, 1998 WL 211814 (6th Cir. 1998); *Friedmann v. Corr. Corp. of Am.*, 11 F. App'x 467 (6th Cir. 2001).
17. Security classification. See, e.g., *Byrd v. Cornell Corr., Inc.*, 60 F. App'x 191 (10th Cir. 2003).
18. Sexual harassment. See, e.g., *Smith v. United States*, 896 F. Supp. 1183 (M.D. Fla. 1995).
19. Strip search. See, e.g., *Milledge v. McCall*, 43 F. App'x 196 (10th Cir. 2002).
20. Unlawful detention. See, e.g., *Blumel v. Mylander*, 954 F. Supp. 1547 (M.D. Fla. 1997); *Willis v. U.S. Corr. Corp.*, 77 F.3d 483, 1996 WL 61797 (6th Cir. 1996).
21. Conditions of transport to private prison. See, e.g., *Wine v. Dep't of Corr.*, No. 00-C-704-C, 2000 WL 34229819 (W.D. Wis. Dec. 27, 2000).

C. Difference with *Bivens* Claims

This section will look at the differences between similar cases brought against private prisons operating under state law and those holding federal prisoners.

As noted, § 1983 only provides a federal cause of action for damages against defendants acting under color of state law, but the equivalent to a § 1983 claim against the federal government is a *Bivens* claim. *Stephenson*, 28 F.3d at 27 (noting that a *Bivens* claim “parallel[s] the analysis used to evaluate state prisoners § 1983 claims”). *Bivens* claims, unlike § 1983 claims, provide for a cause of action for constitutional violations committed by federal officers

under color of federal law. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). Unlike § 1983 claims, however, there is not a “state action” equivalent for claims brought pursuant to *Bivens*. *Marte v. Geo Group Inc.*, No. 1:14-CV-203-BL, 2015 WL 12632288, at *3 (N.D. Tex. Oct. 27, 2015). In fact, the Supreme Court has repeatedly refused to extend liability under *Bivens*, except in limited situations. *Id.*

1. Corr. Servs. Corp. v. Malesko

In *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), the Supreme Court addressed the issue of how to apply the *Bivens* doctrine in the context of an action by a federal inmate against a private prison corporation. *Id.* In a split five-to-four decision, the Supreme Court reiterated that *Bivens*’ purpose was to deter individual federal officers, not a private agency, from committing constitutional violations, and found that *Bivens* did not extend to a right of action for damages against private entities acting under color of federal law.¹⁷ *Id.* at 70-72. In reaching its decision, the Supreme Court also held that “if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury.” *Id.* at 71.

2. Minneeci v. Pollard

In *Minneeci v. Pollard*, 565 U.S. 118 (2012), the Supreme Court declined to extend *Bivens* to recognize an implied Eighth Amendment damages action against private prison employees working at a federal facility operated by a private company. *Id.* In refusing to do so, the Supreme Court noted that the plaintiff’s Eighth Amendment claim focused “upon a kind of conduct that typically falls within the scope of traditional state tort law,” and because the defendant was privately employed, the plaintiff had adequate state law remedies available. *Id.* at 125-26 (noting “in principle, the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations”). Thus, the Supreme Court found that the existence of alternative remedies constituted a convincing reason for the judicial branch to refrain from providing a new and freestanding remedy in damages. *Id.*

VII. ADA AND REHABILITATION ACT

This section will briefly look at another tool that has been used to protect the rights of convicted prisoners, pre-trial detainees, and other people whose liberty has been taken away by the state—the Americans with Disabilities Act (ADA) and Rehabilitation Act. Both acts have been important tools in protecting the rights of people with disabilities, including those in prison. To allege a claim under the ADA and Rehabilitation Act, a plaintiff must show: (1) that he is a qualified individual within the meaning of the Acts; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability. *Lighbourn v. Cnty. of El Paso*, 118 F.3d 421, 428 (5th Cir. 1997); *Frame v. City of Arlington*, 657 F.3d 215, 220-21 (5th Cir. 2011)

The ADA defines a “public entity” as (1) any State or local government; (2) any department, agency, special purpose district, or other *instrumentality* of a State or States or local government. 42 U.S.C. § 12131(1) (emphasis added). The Supreme Court first applied the ADA to prisons in *Pennsylvania v. Yeskey*, 524 U.S. 206 (1998). However, federal courts considering whether the ADA applies to private prisons have repeatedly rejected the plaintiff’s claims. For example, in *Phillips v. Tiona*, 508 F. App’x 737 (10th Cir. 2013), the Tenth Circuit applying the canon of statutory construction *noscitur a sociis* (a word is known by the company it keeps) found that the ADA’s use of “‘instrumentality’ refers to a traditional government unit or one created by a government unit.”¹⁸ *Id.* at 754. Accordingly, it joined “the Eleventh Circuit and the overwhelming majority of other courts that have spoken directly on the issue, and [held] that Title II of the ADA does not generally apply to private corporations that operate prisons.” *Id.*

¹⁷ The Supreme Court also concluded its opinion by stating:

In sum, respondent is not a plaintiff in search of a remedy as in *Bivens* and *Davis*. Nor does he seek a cause of action against an individual officer, otherwise lacking, as in *Carlson*. Respondent instead seeks a marked extension of *Bivens*, to contexts that would not advance *Bivens*’ core purpose of *detering individual officers* from engaging in unconstitutional wrongdoing. The caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades, forecloses such an extension here.

Malesko, 534 U.S. at 74 (emphasis added).

¹⁸ *Noscitur a sociis* [Latin “it is known by its associates”] (18c) is “[a] canon of construction holding that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it.” *Noscitur a sociis*, BLACK’S LAW DICTIONARY (10th ed. 2014). This canon is also termed associated-words canon. *Id.*

VIII. NEGLIGENCE

In addition to claims under § 1983, some courts have also recognized that state law negligence claims can also be brought against private prison operators. In *Stephens v. Corr. Servs. Corp.*, 428 F. Supp. 2d 580 (E.D. Tex. 2006), a pretrial detainee brought an action against a private jail corporation, alleging civil rights violations and common law negligence stemming from an attack while incarcerated. The company moved to dismiss his claims. *Id.* In denying the motion to dismiss, the district court stated:

It is well-established that when a person is taken into custody and held against his will, “the Constitution ... imposes a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005, 103 L.Ed.2d 249 (1989). Because a “special relationship” exists between the prisoner and the prison officials, CSC has a general duty to protect Plaintiff’s well-being and ensure his “reasonable safety” while incarcerated. *Id.* at 200-01, 109 S.Ct. 998. Plaintiff has alleged that CSC breached this duty by not properly segregating Plaintiff from other violent inmates and because of that breach Plaintiff suffered damages. Defendant’s motion to dismiss the negligence cause of action is denied.

Id. at 584. Although the use of state law negligence claims against private prisons does not yet appear to be as widespread as § 1983 claims, it does provide an additional avenue for relief against private prison companies. See generally *Davis v. Collin Cnty. Comm. Coll. Dist.*, No. 4:09-CV-309, 2009 WL 3764135, at *4 (E.D. Tex. Nov. 9, 2009) (citing *Stephens*, 428 F. Supp. 2d at 583).

IX. CONCLUSION

The use of private prisons by local, state, and federal governments raise unique legal issues for inmates seeking to bring legal claims regarding the conditions of their confinement. In bringing lawsuits they encounter differences depending on type of defendant that they sue and how their constitutional legal challenges are applied. Nevertheless, based on recent actions by the Trump Administration, issues associated with private prisons will likely continue to be an issue of legal importance for some time to come.