

for abuse but balanced this against such factors as the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually act in behalf of their children's welfare, the independent role of medical professionals in deciding to accept the children for admission, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing such care and interfere with the ability of parents to assist with the care of institutionalized children.¹²⁶⁷ Similarly, the same concerns, reflected in the statutory obligation of the state to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the government.¹²⁶⁸ Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.¹²⁶⁹

EQUAL PROTECTION OF THE LAWS

Scope and Application

State Action.—The Fourteenth Amendment, by its terms, limits discrimination only by governmental entities, not by private parties.¹²⁷⁰ As the Court has noted, “the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”¹²⁷¹ Although state action requirements also apply to other provisions of the Constitution¹²⁷² and to federal governmental ac-

¹²⁶⁷ 442 U.S. at 598–617. The dissenters agreed on this point. *Id.* at 626–37.

¹²⁶⁸ 442 U.S. at 617–20. The dissenters would have required a preconfinement hearing. *Id.* at 637–38.

¹²⁶⁹ 442 U.S. at 617. The dissent would have mandated a formal postadmission hearing. *Id.* at 625–26.

¹²⁷⁰ The Amendment provides that “[n]o State” and “nor shall any State” engage in the proscribed conduct. There are, of course, numerous federal statutes that prohibit discrimination by private parties. *See, e.g.*, Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a *et seq.* These statutes, however, are generally based on Congress’s power to regulate commerce. *See Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

¹²⁷¹ *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). “It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.” *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

¹²⁷² The doctrine applies to other rights protected of the Fourteenth Amendment, such as privileges and immunities and failure to provide due process. It also applies to Congress’s enforcement powers under section 5 of the Amendment. For discussion of the latter, *see* Section 5, Enforcement, “State Action,” *infra*. Several