

**Statement of Congresswoman Maxine Waters (CA-43)**

*Markup of: H. Res. 694, "Recognizing the Importance of the Civil Rights Act of 1866 and the Laws Derived Therefrom"*

Committee on the Judiciary  
Wednesday, February 12<sup>th</sup>, 2020  
2138 Rayburn House Office Building  
Washington DC 20515

Chairman Nadler, Ranking Member Collins, and distinguished Members of the Judiciary Committee, thank you for honoring my request to make the intent of Congress known, as it pertains to the Civil Rights Act of 1866, by allowing my resolution, House Resolution 694, to move forward for consideration today. Because of recent legal challenges to this statute, it is vitally important that congressional intent be unequivocally affirmed.

In the aftermath of the Civil War, African Americans suffered through a tumultuous integration in which they were systematically and routinely subject to laws, such as the "Black Codes", designed to restrict African American's freedom and keep formerly enslaved persons from thriving in society. In response, Congress enacted the Civil Rights Act of 1866 to accomplish three primary objectives: to establish that all persons born in the United States were to be considered citizens; to clearly define the rights guaranteed by American citizenship; and to make it unlawful for any person to deprive another of these rights based on race. The law's Section 1981 is an extension of these objectives, specifically enumerating protections for citizens when contracting, and crafting a legal avenue for the racially discriminated to seek justice. This resolution acknowledges the history of Section 1981, its significance, and its integral role as a key pillar of civil rights jurisprudence.

A central question before the Supreme Court today is how the Civil Rights Act of 1866 – particularly Section 1981 of the Act – should be interpreted. Specifically, the Court is hearing arguments regarding whether a complaint must allege that the race or color of the claimant was the "but-for factor" in a defendant's contracting decision, or merely a "motivating factor." The respondents argue that race playing any role in a

business' contracting decision is a form of discrimination, in violation of Section 1981, and therefore unacceptable.

In *Russello v. United States*, the Supreme Court established that congressional intent can be derived from the purposeful inclusion or exclusion of enacted language.<sup>1</sup> When Congress initially enacted Section 1981, it specifically excluded language in the original provision that stated, "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery."<sup>2</sup> Upon its enactment, Congress specifically omitted any language delineating the causal requirements necessary for a claimant to bring a complaint under Section 1981. In fact, Congress purposefully excluded that language to allow for a claimant to assert their complaints of racial discrimination in contracting, freely and without trepidation.

Should the petitioner's arguments prevail in the present case, it will be nearly impossible for entrepreneurs, innovators, and creators of color who have been victims of racial discrimination to bring forth lawsuits and have their rights protected and enforced in a court of law. Such a reality plainly undermines Congress' clear intent for the law, as evidenced by former Senator Lyman Trumbull of Connecticut. Upon the original passage of the statute, Senator Trumbull commented that bill's purpose was, "to prohibit all racially motivated deprivations of the rights enumerated in the statute."<sup>3</sup> Senator Trumbull clarified that the statute prohibits not just actions based solely on race but all actions that are motivated, even in part, by race. The impact of a ruling that ignores congressional intent and undermines Section 1981 would extend beyond cable contracts and make it extremely difficult for any class or individual to bring a race-based contract discrimination lawsuit before the courts.

As a former Member of the House Judiciary Committee, I am proud to see the Committee on the Judiciary's consideration of House Resolution 694 – a resolution affirming Congress' support for Section 1981

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<sup>1</sup> *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)

<sup>2</sup> Cong. Globe, 39th Cong., 1st Sess. 474 (1866)

<sup>3</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968).

of the Civil Rights Act of 1866. Today marks a significant step in our fight to ensure that discrimination is eliminated from our business practices.

In order to further express congressional intent behind the codification of Section 1981, I led my colleagues in introducing this resolution, which makes clear that the U.S. Congress strongly opposes any attack on equal rights protections for people of color and marginalized groups under the Civil Rights Act of 1866.

The resolution boasts support from the entire Congressional Black Caucus, a plurality of the Congressional Progressive Caucus, is endorsed by the National Association for the Advancement of Colored People (NAACP), and maintains support from a variety of civil rights organizations who have united to protect minorities in corporate settings across the country.

I understand the Judiciary Committee has many pressing matters before it's consideration, and I am deeply appreciative of the opportunity to have my resolution considered today. I urge the Committee to support this timely piece of legislation and join me in recognizing the importance of Section 1981 of the Civil Rights Act of 1866 which was, and remains today, a vital tool against racial discrimination in business.

A handwritten signature in cursive script that reads "Maxine Waters".

Maxine Waters

Member of Congress