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GOP eyes taking marriage from courts

House Republicans yesterday emphasized their eagerness to reassert congressional authority over the judicial branch, holding a hearing on stripping federal courts of their jurisdiction to hear cases pertaining to same-sex "marriage."

Republicans and conservative activists have contemplated restricting the jurisdiction of "out-of-control" courts on other issues, such as the Pledge of Allegiance and public acknowledgment of God.

But some think same-sex "marriage" presents the strongest combination so far of interest and opportunity.

"The marriage issue gives us a great political window of opportunity into what Congress can do to limit the courts," said Rep. John Hostettler, Indiana Republican.

Mr. Hostettler has crafted a

bill that would strip the federal courts and the Supreme Court of their ability to hear cases pertaining to the 1996 federal Defense of Marriage Act (DOMA), which said states don't have to recognize same-sex "marriages" from other states.

Supporters of the bill say it is an immediate way to stop a renegade federal judge from striking down DOMA and forcing states to recognize homosexual "marriages" performed in Massachusetts.

"It is imperative that Congress stop federal judges from asserting judicial supremacy over our rights of self-government," said Phyllis Schlafly, who said the courts are perpetrating a "judicial outrage" against federal statutes on

marriage.

Opponents say court-stripping would deny a particular group of people — in this case, homosexuals — the ability to have their grievances heard at the federal level.

"It's very dangerous, and it should not be done," said Rep. Jerrold Nadler, New York Democrat and House Judiciary Committee member.

Mr. Nadler said a particular decision could be overturned either by passing a law or a constitutional amendment. Court-stripping is "depriving citizens of their right to go to court," he said.

The federal DOMA also defined marriage as the union of a man and a woman for purposes of federal law. Mr. Hostettler's bill would strip jurisdic-

tion over this from federal appeals courts and the Supreme Court, but would leave federal district courts alone.

The Senate is set to vote the week of July 12 on a constitutional amendment defining marriage as the union of a man and a woman, but the House is moving more cautiously. House leaders are considering holding votes on other types of legislation related to marriage — such as the court-stripping bill — before bringing an amendment to the House floor.

Some House Republicans see a court-stripping bill as a better first step.

Rep. J. Randy Forbes, Virginia Republican, said he is concerned that homosexual "marriage" — and the costly benefits that go along with marriage —

will be forced upon other states, but he wants to try the narrowest solution first.

"If we can do it on the more narrow basis, that's certainly preferable," he said.

During a House Judiciary constitution subcommittee hearing yesterday, most of the legal scholars agreed the Constitution grants Congress the right to strip jurisdiction from the Supreme Court and lower federal courts.

"Congress possesses broad constitutional authority to control the jurisdiction of both the lower federal courts and the U.S. Supreme Court," said Martin H. Redish, a law professor from Northwestern University School of Law.

But Michael J. Gerhardt, a law professor from William and

Mary Law School, said Congress cannot strip jurisdiction if it violates peoples' right to equal protection or infringes on separation of powers. He said Congress repeatedly has resisted the temptation to strip court jurisdiction.

"Distrust of 'unelected judges' does not qualify as a legitimate basis, much less a compelling jurisdiction, for congressional action," he said.

Mr. Redish also advised against court-stripping because "we'd be left with 50 state-court interpretations of a federal law."

But bill supporters noted that Congress has stripped courts before, including in 2002, when it passed legislation pushed by Senate Minority Leader Tom Daschle, South Dakota Democrat, that prohibited federal courts from hearing lawsuits challenging brush clearing in the Black Hills of South Dakota.