University Hospital’s plan to follow Catholic health-care directives under a pending merger could violate the U.S. Constitution’s provision to keep state and religious matters separate, some legal advocates and constitutional scholars say.

That issue arises from the hospital’s roles as Louisville’s main provider of indigent care and as the main teaching hospital for the University of Louisville, a state school. The state’s control of the real estate where the hospital stands is also a factor.

If those facts make University Hospital a public institution — which many elected leaders say it is, but which U of L disputes — it could be unconstitutional for the hospital to adopt Catholic policies, law professors and watchdog groups say.

“We certainly have very serious reservations about the legality of the merger” because of the church-state issue and others, said William Sharp, staff attorney for ACLU of Kentucky.

The national ACLU has gone to court over mergers of Catholic and public hospitals in other states, resulting in two being canceled by partners in the early 2000s.

Sharp would not say whether ACLU of Kentucky is considering a legal challenge of the University Hospital deal, but said “we’ve been concerned about the proposed merger for some time.”

The Constitution “prohibits a hospital from imposing religious restrictions on land or in a facility that is owned by a government entity,” officials of the National Women’s Law Center and the MergerWatch Project, which monitor hospital mergers, asserted in a recent letter to Kentucky Attorney General Jack Conway.

The merger would combine University and two other Kentucky health-care systems to form a statewide organization controlled by Denver-based Catholic Health Initiatives. The participating hospitals, including Jewish Hospital in Louisville, have agreed to follow Catholic care policies.

That means University Hospital no longer would provide tubal ligations, a common form of female sterilization, or dispense birth control, among other potential changes of practice.

The third merger partner, St. Joseph Health System of Lexington, is owned by Catholic Health Initiatives and already follows the church directives. The merger must be approved by Gov. Steve Beshear before taking effect and also by the bishops of Louisville and Lexington, because CHI is considered a Catholic ministry.
Several church-and-state experts at law schools outside Louisville said University’s inclusion in the merger raises a constitutional issue because of the so-called Establishment Clause forbidding government from favoring religion.

The clause, part of the First Amendment, reads “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

The U.S. Supreme Court has never ruled on a church-versus-state case involving a hospital merger, those experts said. But in cases that didn’t involve hospitals, the court has said “it is a violation of the Establishment Clause for a public institution to revise its policies to adhere to a specific religious doctrine,” said Steven K. Green, director of the Center for Religion, Law & Democracy at Willamette University.

“The fact that this hospital may previously have been engaged in certain types of (medical) procedures, and the only reason it’s changing is to adhere to Catholic doctrine — that’s potentially problematic,” he said.

Leslie C. Griffin, constitutional law professor at the University of Houston, said a state institution should not be able to adopt a theology-based set of rules, “just as a state can’t pass legislation saying, ‘We adopt the teaching of the Methodist Church doctrine on this,’ or ‘We adopt Biblical teaching on creation science.’”

And Richard W. Garnett, law professor at the University of Notre Dame, said: “We could have what the court has called ‘excessive entanglement’ between religious and governmental authority.”

However, Garnett and other scholars said there would be no constitutional problem with the merger if University Hospital is determined to be a private rather than a public entity.

Since the merger was announced months ago, U of L has maintained that the downtown hospital bearing its name is private because it is operated by University Medical Center Inc., a nonprofit corporation, under a state contract. For that reason, Jennifer Elliott, attorney for University Hospital, said there is no church-and-state issue with the merger.

Elliott said that federal judges in Louisville have determined UMC is not a “state actor,” meaning an extension of government or an entity created for a state purpose, and cited a ruling to that effect last year in an employee’s wrongful-firing suit.

But the ACLU’s Sharp said that ruling and others were based on the particular evidence presented in those cases and don’t amount to a definitive finding that University is private.

Beyond operating a state-owned property, University Medical Center has several ties binding it to U of L. The corporation turns over much of its annual profit to the university, its board chairman must be either the U of L president or his designee, and its affiliation agreement with the university calls for it to “sustain and enhance (U of L’s medical) education and research.”
Numerous Louisville and Kentucky government officials have stressed they believe University Hospital is a public institution. They include state auditor Crit Luallen, who was secretary of the state Finance and Administration Cabinet when it authorized UMC to begin operating the hospital in 1996.

“The state owns and has (had) control of the public asset of the University Hospital for all these years,” she said. “Even though others have been given permission to manage and operate the hospital, that has been granted to them by virtue of power of the governor and the finance cabinet.”

Luallen added that the main reason University is public is not the building’s ownership but its public mission, including the indigent care funded by the state there for nearly 40 years.

Last year alone, the hospital received $68 million from state and local government toward care for the poor. However, that in itself may not be a constitutional problem since the Supreme Court has ruled that giving public funds to a religious hospital is legal because a hospital’s business is mainly secular.

Conway, who is reviewing the merger’s legality with Luallen’s help, has said “the (University) hospital building and the right to operate it are public assets paid for and owned by taxpayers.” And Rep. Tom Burch, D-Louisville, chairman of the House Health and Welfare Committee, told The Courier-Journal recently that “most people in Louisville believe University Hospital belongs to us.”

Some constitutional scholars also said University could be found a public institution if the church-state issue went before a judge.

“I think there is an awfully good argument that that this remains sufficiently a public facility that the Constitution would still apply to its health-care policies,” said Ira Lupu, law professor at George Washington University and an authority on religion and the Constitution.

That would mean that a change in health-care policy that was “driven by Catholic religious doctrine would not be acceptable,” Lupu said.

“If this is the place where the state has been taking care of indigent people for a long time, that should be a pretty good argument that (University Hospital is) a state actor,” said University of Houston’s Griffin, who has authored textbooks on religion law.

But Francis J. Manion of New Hope, Ky., senior counsel with the the conservative American Center for Law and Justice, said the argument that the merger could violate the Constitution is “baloney.”

Manion cited a 2005 U.S. Supreme Court ruling in a case involving the display of the Ten Commandments on the grounds of the Texas state capitol, which said that “simply ... promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”

Americans United for Separation of Church and State — which like the ACLU typically comes down on the other side of the issue from Manion’s organization — believes the merger would be unconstitutional, said senior litigation counsel Alex Luchenitser.
Americans United, like the ACLU and the National Women’s Law Center, has sometimes intervened in hospital merger cases that include religious and public partners.

The organization was among those that in 2000 challenged the inclusion of a city-owned hospital in St. Petersburg, Fla., in a new system that included two Catholic hospitals. After the deal was completed, the city filed suit, saying it had not been aware its hospital’s operator had agreed to follow Catholic health-care directives and arguing the restrictions violated the Constitution.

After a period of litigation, the new health-care system released the city-owned facility, making the suit moot.

In a similar case in Newport, Ore., a proposed deal for a Catholic system to begin operating a municipal hospital was canceled after community concerns led to a lawsuit in 2000, according to a summary of the case by the National Women’s Law Center.

A state judge heard testimony for a week on whether the deal would create excessive government entanglement in religion — one of the tests of whether such deals are constitutional — but the Catholic partner withdrew from the venture before a decision was rendered.

The Florida and Oregon cases show that raising the church-state issue in court can undo Catholic mergers that involve public hospitals, said Jill Morrison, senior counsel with the National Women’s Law Center, which like the ACLU has monitored the Kentucky merger.

U of L officials say the merger is misunderstood and too much attention has been focused on possible problems rather than the deal’s many benefits, including improving the state’s health and dramatically expanding medical teaching programs at U of L as a result of investment by CHI.

The company has agreed to provide $320 million immediately for the new venture, and U of L has been promised $200 million later to improve its academic medical center. The merger would extend U of L medical expertise across the state and help train more doctors to ease Kentucky’s shortage, officials say.

“The naysayers have thrown out a number of issues,” Dr. David Dunn, U of L executive vice president for health affairs, said at a press conference last week. “But the real focus should be on the improved health and improved expansion of health-care services for the citizens of the commonwealth.”