The following article was posted to the CNBC website on Thursday, September 8, 2011:

Constitutional questions raised by proposed merger

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LOUISVILLE, Ky. - Some legal advocates and constitutional scholars have questioned a plan by University Hospital to follow Catholic health care policies if a proposed merger is approved, according to a published report.

American Civil Liberties Union attorney William Sharp told The Courier-Journal that his group has "very serious reservations about the legality of the merger." (http://bit.ly/qUrSiA)

He and others question whether it would violate the Constitution's provision to keep matters of state and religion separate.

The proposal would merge University with Jewish Hospital & St. Mary's HealthCare in Louisville and St. Joseph Health System of Lexington to form a statewide organization. They would be under the control of Denver-based Catholic Health Initiatives. The hospitals have agreed to follow Catholic health policies, which means that among other things it would no longer perform tubal ligations or dispense birth control.

There is a dispute over whether University Hospital is a public institution.

Some elected officials say that it is, citing the hospital's role as the main provider of indigent care in Louisville. They also say it is the main teaching hospital for the University of Louisville, which is a state school and it controls the real estate where the hospital is located.

University of Louisville officials have disputed that, saying the hospital is private because it is managed by the nonprofit University Medical Center Inc., not by a government agency.

Jennifer Elliott, an attorney for University Hospital, said a church-and-state issue does not exist with the merger because University is private.

The National Women's Law Center and the MergerWatch Project said in a letter to Kentucky Attorney General Jack Conway that the Constitution "prohibits a hospital from imposing religious restrictions on land or in a facility that is owned by a government entity."

The proposed merger must get approval from Gov. Steve Beshear and from the bishops of Louisville and Lexington before it can proceed.

Several church-and-state experts at law schools outside Louisville told the newspaper that the inclusion of University in the merger raises a constitutional issue.

Part of the First Amendment, reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."
Steven K. Green, director of the Center for Religion, Law & Democracy at Willamette University, said the U.S. Supreme Court has ruled that "it is a violation of the Establishment Clause for a public institution to revise its policies to adhere to a specific religious doctrine."

"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.

University of Houston constitutional law professor Leslie C. Griffin 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.'"

However, the scholars said no constitutional problem would exist with the merger if University Hospital is determined to be a private institution.

Elliott, the University Hospital attorney, said federal judges in Louisville have said UMC is not a "state actor," meaning an extension of government or an entity created for a state purpose.

University of Louisville officials say there's been too much attention focused on possible problems with the merger rather than on benefits of the deal. They say the merger would improve the state's health and dramatically expand medical teaching programs at U of L. In addition, they say it would spread U of L medical expertise to other areas of the state and help train more doctors, which would ease Kentucky's shortage.