I. Introduction

This article examines union action to gain jobs by inducing state and municipal governmental bodies, and most recently, the federal government as well, to direct that all work on a tax-financed construction project must be performed under the terms of a pre-hire project labor agreement ("PLA"). The effect is to freeze out nonunion ("open-shop") contractors and their employees unless such contractors are willing to sign, or at least adhere to, the labor agreement, recruit employees from the union hiring halls, or have their employees join or pay fees to the union.

The Boston Harbor clean-up agreement was the first major PLA. After the U.S. Supreme Court ruled that such contracts were not preempted\(^1\) by the National Labor Relations Act ("NLRA"), as amended,\(^2\) unions have lobbied to gain such agreements in many parts of the nation. Then, in April 1997, President Clinton announced that he would issue an executive order, later changed to a memorandum, "encouraging" federal agencies to require the use of project labor agreements, or other arrangements, on federally funded construction projects.\(^3\)

Section II provides the background for this discussion by describing the decline of construction union membership since World War II. It also references the major policies that unions are utilizing in attempting to regain market share and jobs. Section III examines the nature and extent of these project agreements. Section IV looks at the rationales advanced by adherents of these project agreements for requiring them, including the performance of the parties who have signed such agreements, their relative success in achieving their goals, and the ways in which unionized and open-shop contractors differ materially in utilizing labor. Section V analyzes the legal questions involved, including the potential conflict between such agreements and state and municipal procurement legislation. Because of the extent of litigation in nine states — New Jersey, New York, Ohio, California, Minnesota, Massachusetts, Illinois, Nevada,
and Alaska — developments in these areas are discussed in detail. And the potential impact of the Clinton memorandum will also be discussed in this section.

II. Construction Union Decline since World War II

Construction unions have developed new “market recovery” policies because of the devastating decline in union membership since World War II. Figure 1 shows that overall union membership in this country has shrunk by nearly 60 percent since 1945, and for 1996 stood at only 14.5 percent of the labor force. Moreover, if one looks only at the private sector and excludes governmental employees from the data, then union membership in 1995 was just 10.2 percent of the labor force (Figure 2).

Figure 3 shows that construction unions have contributed substantially to this membership decline. In 1947, with 87.1 percent of the construction labor force as members, these unions had a virtual monopoly. By 1973, this percentage was down to 40 percent, and in 1996 it stood at only 18.5 percent. Meanwhile, the construction labor force has increased by about 1.5 million since 1970.

The decline of construction union membership has, of course, resulted from the loss in the unionized contractors’ share of the market for construction. Uneconomic labor costs have been a major factor in this loss of market share. In the first nationwide study of the market penetration of open-shop construction, it was estimated that in 1975, “it appears likely that the open-shop builders are in the majority and probably control 50 to 60 percent of the total work.” A second study made nine years later concluded that

the dollar volume of construction produced by unionized craftsmen is not likely to exceed 30 percent of the total. . . . During the years since 1970, open shop construction has increased in the sectors and regions in which it has historically dominated. At the same time, sectors and regions which traditionally have been union strongholds have been significantly penetrated by the open shop.

No study of this nature has been published since 1984, but based on regular monitoring of the field, the open-shop share of the construction dollar has probably stabilized at 75–80 percent.

Union and Unionized Contractor Reaction to Decline. In response to this decline, construction unions and unionized contractors have developed a host of economic and political initiatives designed to bolster or protect their memberships and businesses. Many contractors have either broken with unions and now operate open shop, or have developed or purchased an open-shop company and now operate “doublebreasted,” that is, have two separate concerns, one unionized, one open shop, so that they can bid and operate successfully on jobs depending on the competition, the user preference, and the market orientation in a given sector or area. Unions and contractors have negotiated agreements removing or modifying numerous restraints to productivity and flexibility of operations. Many such restraints, however, remain in agreements particularly in localities, such as Boston, New York City, San Francisco, and Philadelphia, where unions remain strong.