# FIT to Be King: How Feed-in Tariffs Will Allow the United States to Reclaim Its Throne in Clean Energy Finance and Investment

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*"Energy will be the immediate test of our ability to unite this Nation, and it can also be the standard around which we rally. On the battlefield of energy we can win for our Nation a new confidence, and we can seize control again of our common destiny." – Jimmy Carter, Crisis of Confidence Speech, July 15, 1979*

*"As President, I'll invest in renewable energies like wind power, solar power, and the next generation of homegrown biofuels. That's how America is going to free itself from our dependence on foreign oil – not through short-term gimmicks, but through a real, long-term commitment to transform our energy sector." – President Obama, Townhall on Energy, Cedar Rapids, Iowa, July 31, 2008*

## INTRODUCTION

Since 2005, China has embarked on a meteoric rise toward becoming the undisputed leader in clean energy development and deployment.[1] In stark contrast, the United States' commitment to being a leader in clean energy has wavered, as evident by

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**The editorial team at the *Willamette University Environmental Law Journal* is proud to present this inaugural Issue. Many months have passed since we first advertised and promised this Issue. As with all new ventures, many unexpected complications, in addition to the usual ones, delayed us. As a result, some of this Issue's articles were authored in the fall 2012 and spring 2013. I nonetheless believe this Issue's articles remain highly relevant and further the mission of this Journal—*viz*: to encourage those interested in environmental law issues to publish the results of their research, express their ideas, and stimulate ongoing discussion and research. We hope that you find this Issue of the Environmental Law Journal a valuable legal resource.

[1] THE PEW CHARITABLE TRUSTS, WHO'S WINNING THE CLEAN ENERGY RACE? 14-15 (2012), *available at* http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Report/-clenG20-Report-2012-Digital.pdf.

its year to year fluctuations in clean energy investment.[2] Although the United States currently ranks second in the world in terms of clean energy investment, its uncertain energy policy has caused untold economic, national security, and environmental benefits to go unclaimed.[3] Formerly the leader in clean energy investment, the United States is now mired in its own complacency, seemingly unwilling to make the necessary changes to take full advantage of its clean energy potential.

At the heart of the United States' stagnancy is its lack of a strong national policy regarding clean energy investment.[4] Strong domestic policies have been critical to the clean energy successes of the United States' Group of Twenty (G-20) cohorts.[5] China, Brazil, Germany, and Spain, for instance, have all implemented national renewable energy and efficiency standards.[6] The United States has followed a different approach, however.[7] Lacking a strong national renewable energy policy, the United States has instead relied upon states to enact individualized renewable energy standards.[8]

A major problem with the United States' state-by-state approach, however, is that it fails to provide the necessary impetus to move the entire nation towards renewable

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[2] *Id.* at 19.
[3] *Id.* at 19, 21.
[4] *Id.* at 19.
[5] THE PEW CHARITABLE TRUSTS, WHO'S WINNING THE CLEAN ENERGY RACE?: GROWTH, COMPETITION AND OPPORTUNITY IN THE WORLD'S LARGEST ECONOMIES 10 (2010), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Global_warming/G-20%20Report.pdf. The G-20 refers to the group of finance ministers and central bank governors from twenty of the world's largest economies that was formed to provide a forum for international cooperation to address global economic issues. The G-20 is comprised of representatives from Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States of America, and the European Union). *What is the G-20*, G20.ORG, http://www.g20.org/docs/about/about_G20.html (last visited Oct. 4, 2013).
[6] *Id.*
[7] *See id.*
[8] *Id.*

energy development. The state-by-state approach has given rise to free rider problems because the federal government has left it to the states to enact and implement renewable energy policies without providing any framework or national commitment to ensure that states effectively do so.[9] As a result, some states have renewable energy policies while others do not.[10] This disparity in commitment creates great inequities among the states because those states not enacting and implementing clean energy policies are nonetheless able to benefit from the positive externalities created by neighboring clean energy policies—such as reduced national security costs, lower and steadier fossil fuel prices, and reduced greenhouse gas emissions—without sharing in the associated costs.[11]

Most of the states in the U.S. that have renewable energy policies have used Renewable Portfolio Standards (RPS) to promote renewable energy investment and development.[12] RPS mechanisms require electric utilities to purchase minimum quantities of renewable energy from developers who compete to produce renewable energy at the lowest possible cost.[13] Although RPS models are often favored because they impose a relatively low cost on ratepayers by leaving rate-setting to the market rather than the government, their emphasis on low-cost development and their inability to

[9] Shelley Welton, *From the States Up: Building a National Renewable Energy Policy*, 17 N.Y.U. Envtl. L.J. 987, 997 (2008).
[10] *Id.*
[11] *Id.*
[12] RYAN WISER & GALEN BARBOSE, LAWRENCE BERKELEY NATIONAL LABORATORY, RENEWABLES PORTFOLIO STANDARDS IN THE UNITED STATES 1 (2008).
[13] *Id.* at 2.

provide investment security for developers have proven to be legitimate obstacles to more efficient and effective energy development.[14]

An alternative to RPS is the Feed-in Tariff (FIT), a policy mechanism that has grown to become the world's most prevalent renewable energy policy, thanks in large part to German leadership in designing one of the most successful FITs in the world.[15] A FIT is a preferential rate, not subject to negotiation or competition, which electric utilities must pay to renewable energy developers when they purchase renewable energy.[16] Although rate-setting is subject to numerous criteria, the rate should generally be set high enough to attract developers into the market, but low enough that ratepayers can still afford to pay.[17] Thus, FITs give the initial push for renewable energy development while allowing time for technology to improve and become less expensive due to economies of scale and increased efficiency.[18] Through its FIT, Germany catapulted itself to the forefront of the global solar energy market and oversaw a rise in the share of total electricity created by renewable energy resources from 6.3% in 2000 to 11.9% in 2006.[19] Germany's FIT has also been responsible for widespread job creation, greenhouse gas reduction, and greater energy independence.[20]

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[14] RYAN WISER, KEVIN PORTER & ROBERT GRACE, LAWRENCE BERKELEY NATIONAL LABORATORY, EVALUATING EXPERIENCE WITH RENEWABLES PORTFOLIO STANDARDS IN THE UNITED STATES 4 (2004).
[15] Wilson H. Rickerson, Janet L. Sawin & Robert C. Grace, *If the Shoe FITs: Using Feed-in Tariffs to Meet U.S. Renewable Electricity Targets*, Electricity J., May 2007, at 73, 75.
[16] *Id.*; John Perkins, Comment, *Overcoming Jurisdictional Obstacles to Feed-In Tariffs in the United States*, 40 Golden Gate U.L. Rev. 97, 105 (2009).
[17] David Grinlinton & LeRoy Paddock, *Climate Change and the Future of Energy: The Role of Feed-In Tariffs in Supporting the Expansion of Solar Energy Production*, 41 U. Tol. L. Rev. 943, 946 (2010).
[18] *Id.*
[19] Rickerson et al., *supra* note 15.
[20] In 2006, 130,000 jobs were added to the renewable energy sector as a result of the German FIT. Additionally, by 2006, 45 million tons of carbon dioxide had already been saved. FEDERAL MINISTRY FOR THE ENVIRONMENT, NATURE CONSERVATION AND NUCLEAR SAFETY, EEG – THE RENEWABLE ENERGY SOURCES ACT 4 (2007).

Germany's commitment to FITs is emblematic of a larger consensus on the comparative advantages of FITs relative to RPS policies. For example, after comparing the efficiency and effectiveness of RPS and FITs, the European Commission concluded that RPS mechanisms were, in general, less effective and efficient than FITs because of the increased investor confidence that FITs inspired.[21] This comparative superiority in performance explains the widespread popularity FITs have achieved not only in Europe, but also throughout the world.[22]

Despite this international popularity, the United States has seemed altogether unimpressed, with the majority of states remaining loyal to RPS.[23] This anemic response to the growing international consensus that FITs are superior to RPS is largely due to federal governmental complacency.[24] The United States' actions and inactions indicate that it is content with the progress of RPS mechanisms and that it wants to avoid rocking the boat by enacting a national FIT.[25]

A national FIT need not significantly upset the status quo, however. Some states have enacted FIT legislation despite existing RPS policies, demonstrating that FITs and RPS policies are not necessarily mutually exclusive.[26] In fact, FITs can be used to meet

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[21] Rickerson et al., *supra* note 15.
[22] As of January 2007, 18 European Union nations, along with Brazil, Indonesia, Israel, South Korea, Nicaragua, Norway, Sri Lanka, Switzerland, and Turkey, employed FITs. *Id.* at 74.
[23] Brad A. Kopetsky, Comment, *Deutschland Uber Alles: Why German Regulations Need to Conquer the Divided U.S. Renewable Energy Framework To Save Clean Tech (and the World)*, 2008 Wis. L. Rev. 941, 957 (2008). Exceptions include California, Vermont, and Hawaii, which have each enacted FIT legislation, while Oregon and Michigan have each started pilot FIT programs. Grinlinton & Paddock, *supra* note 17, at 969-72.
[24] Rickerson et al., *supra* note 15, at 79.
[25] *See id.*
[26] *Id.*

RPS generation goals.[27] Although countries such as Germany and Spain did not implement hybrid RPS/FIT energy policies,[28] the United States can still learn from their example and start out on a path of its own by enacting a national FIT that works alongside state RPS initiatives. Such a national policy, in tandem with a state-by-state approach, would undoubtedly strengthen the United States' energy industry and start the United States on an accelerated path to energy independence and security.

Of course, there are challenges to enacting a national FIT in the United States, even if existing RPS policies were to remain in effect. Chief among those concerns is the role of federalism in the United States and how it conflicts with federal mandates.[29] Federalism is a fundamental value in the United States, so much so that any national initiative to compel states to comply with a national FIT would likely be met with hostility as an encroachment by the federal government on state autonomy.[30] There are ways to ensure compliance with a national FIT, however, that fall short of requiring states to enforce a federal regulatory scheme.[31] For instance, the federal government can avoid a strict mandate by conditioning the receipt of federal funding on compliance with FIT legislation.[32] With such options available, the possibility of a national FIT will ultimately depend on the political will to work towards a more progressive and ambitious pursuit of energy independence.

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[27] KARLYNN CORY, TOBY COUTURE & CLAIRE KREYCIK, NATIONAL RENEWABLE ENERGY LABORATORY, FEED-IN TARIFF POLICY: DESIGN, IMPLEMENTATION, AND RPS POLICY INTERACTIONS 9-10 (2009).
[28] Rickerson et al., *supra* note 15, at 74.
[29] *See* Grinlinton & Paddock, *supra* note 17, at 969; Patricia T. Northrop, *The Constitutional Insignificance of Funding for Federal Mandates*, 46 Duke L.J. 903, 903-04 (1997).
[30] Grinlinton & Paddock, *supra* note 17, at 969.
[31] *See South Dakota v. Dole*, 483 U.S. 203, 208-09 (1987) (discussing the ability of Congress to use its spending power to respond to interstate problems that require a national solution).
[32] *See id.*

This Note will argue that the United States Congress should pass a national FIT for solar energy, which would function alongside existing state RPS, under which the Federal Energy Regulatory Commission (FERC) would set regional tariff rates and state public utility commissions (PUC) would be encouraged to incorporate the rates within their existing retail rate structures for electricity. Such a national FIT policy would not only offer greater security to renewable energy investors and diversify the United States' energy portfolio, but it would also mitigate state free rider problems and allow the United States to assert a new national commitment to renewable energy development.

This Note will begin by examining the status quo in the United States regarding renewable energy development and investment, with specific attention paid to the prevalence of state-by-state RPS models and the ability of states employing such models to promote renewable energy development. Part II will discuss FITs as a policy mechanism that could effectively supplement RPS, and will then examine the current status of FITs in the United States. Part III will argue that the United States must acknowledge the benefits of FITs and commit to formulating a national policy in order to better develop renewable energy and pursue energy independence. The section will explain how a national FIT, as a complement to existing RPS policies, would promote renewable energy development. Part IV will discuss the contours of the proposed national FIT. It will begin by looking to Congressman Inslee's prior proposal for a national FIT, which is in large part based on the German model, as a starting point for national FIT legislation in the United States. Then, it will recommend several changes to Congressman Inslee's bill that would better enable the bill not only to become law, but

also to provide positive momentum as the United States continues to adopt a more progressive and successful renewable energy policy. Part V will conclude by examining the constitutionality of the revised national FIT bill outlined in the previous section. Specifically, it will demonstrate that a federal mandate that conditions federal funding on states' incorporating the tariff rate into their existing electricity retail rate structure does not violate the 10th Amendment.

## I. THE STATUS QUO: RENEWABLE PORTFOLIO STANDARDS AND THE UNITED STATES

### *Renewable Portfolio Standards Defined*

RPS are the dominant mechanisms for promoting clean energy investment and development in the United States, with approximately twenty-nine states and Washington, D.C. using such policies.[33] Functioning as a market solution to renewable energy development deficiencies, RPS mechanisms require electric utilities either to develop minimum quantities of renewable energy or to purchase those quantities from developers who compete to produce renewable energy at the lowest possible cost.[34] Although electric utilities are required to secure minimum quantities of renewable energy, with those quantities normally increasing over time until a target percentage is

[33] As of May 3, 2011, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Illinois, Kansas, Massachusetts, Maryland, Maine, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, Wisconsin, and Washington DC had mandatory RPS policies. *Renewable Portfolio Standard Policies*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY (Mar. 2013), http://www.dsireusa.org/documents/summarymaps/RPS_map.pdf.

[34] WISER & BARBOSE, *supra* note 12, at 2; WISER ET AL., *supra* note 14, at 3.

met,[35] they are not required to purchase or produce any specific type of energy in order to meet the required quota.[36]

Indeed, the flexibility provided by RPS mechanisms to electric utilities and renewable energy developers is one of the chief advantages of RPS.[37] Because developers are not forced to produce, and utilities are not forced to procure, any particular type of energy, both sides have a valuable incentive to work toward providing cost-effective energy, thereby shielding electricity ratepayers from excessively high energy bills.[38] Furthermore, proponents of RPS argue that because electric utilities are forced either to produce the renewable energy themselves or to procure it from developers directly, RPS mechanisms promote administrative ease relative to other policies.[39] Lastly, RPS mechanisms are considered to be in line with the American tradition of finding market solutions to domestic challenges because they rely on the free market, rather than the government, to secure compliance and ensure investment in renewable technologies.[40]

But, RPS policies are not without disadvantages. Because renewable energy costs are determined by the transactions that take place between utilities and renewable energy developers, costs cannot be accurately identified with certainty in advance of such

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[35] For example, North Carolina, whose RPS statute is typical of many states' policies, requires that renewable energy sales account for 3% of 2011 retail sales, 6% of 2014 retail sales, 10% of 2017 retail sales, and 12.5% of 2020 retail sales. Lincoln L. Davies, Comment, *Power Forward: The Argument for a National RPS*, 42 Conn. L. Rev. 1339, 1359 (2010).
[36] *Id.* at 1357.
[37] WISER ET AL., *supra* note 14, at 3.
[38] *Id.* at 3, 4.
[39] *Id.* at 4.
[40] Michael E. Streich, *Green Energy and Green Economy Act, 2009: A "FIT"-ing Policy for North America?*, 33 Hous. J. Int'l L. 419, 447 (2011).

transactions.[41] Moreover, in general, RPS policies are poorly suited for promoting diversity among renewable technologies because they promote cost-efficient technologies at the expense of those technologies that are more expensive to develop.[42] Indeed, although RPS mechanisms allow utilities and developers to satisfy the demand for renewable energy without placing constraints on the technologies to be used, the emphasis that RPS policies place on cost-efficiency necessarily means that certain renewable technologies will be avoided—despite their comparative advantages—in favor of their cheaper alternatives.[43] Resource diversity is critical, however, because it not only ensures a reliable supply of energy, but it also increases operational flexibility in the supply of energy (for instance, in response to outages or congestion), mitigates fuel prices by controlling price volatility, and reduces the environmental impact of procuring renewable energies.[44]

*The Prevalence of Renewable Portfolio Standards in the United States*

As of May 2011, twenty-nine states and Washington, D.C. had mandatory RPS policies in place to spur renewable energy development and investment.[45] It is estimated that, once fully implemented, these RPS policies will govern roughly 46% of retail electricity in the United States.[46] But, as these numbers indicate, not all states have established mandatory RPS policies.[47] Furthermore, some of the states that have

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[41] WISER ET AL., *supra* note 14.
[42] *Id.*
[43] *Id.*
[44] KENNETH ROSE & KARL MEEUSEN, REFERENCE MANUAL AND PROCEDURES FOR IMPLEMENTATION OF THE "PURPA STANDARDS" IN THE ENERGY POLICY ACT OF 2005 49-53 (2006).
[45] *Renewable Portfolio Standard Policies*, *supra* note 33.
[46] WISER & BARBOSE, *supra* note 12, at 5.
[47] *Id.*

established such policies have also provided exemptions to particular types of utilities and customers.[48] As a result, RPS policies are still a long way from completely satisfying the United States' renewable energy needs.

Despite this gap between current supply and overall need, mandatory state RPS policies have demonstrated a potential for success. The Union of Concerned Scientists estimates that state RPS policies will support 46, 270 megawatts of new non-hydroelectric renewable power by 2020, which would mark an increase of more than 340% since 1997, and would meet the electricity needs of roughly 28.5 million homes.[49] Over this period, RPS policies are also expected to contribute to the reduction of annual carbon dioxide emissions by 108 million metric tons.[50] This potential for success stands firm alongside what appears to be a relatively low cost impact on electricity ratepayers. Existing RPS policies, for instance, have generally overseen rate increases of 1% or less, and many states have even been able to price renewable electricity competitively with fossil fuels.[51]

Mandatory state RPS policies are not the harbingers of success, however, that they seem to be. Although RPS policies are mandatory in the states that elect to enact such legislation, it is not mandatory for all states to have such a policy in the first place.[52] Consequently, despite projections that state RPS policies will successfully generate

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[48] *Id.*
[49] Kopetsky, *supra* note 23, at 959.
[50] *Id.*
[51] WISER & BARBOSE, *supra* note 12.
[52] *Id.* at 5.

renewable energy in the future,[53] and that such generation will come at a relatively marginal cost to ratepayers,[54] the prevalence of mandatory state RPS policies in the United States is more telling of a nation that is willing to do more to generate renewable energy domestically, but not *that much* more. The state-by-state RPS approach was a good first step towards positioning the United States for energy independence, but RPS models are ill-equipped to take the United States to the next level by themselves. They simply do not foster the type of resource diversity that will ensure a reliable, flexible, and cost effective supply of energy,[55] and cannot encourage the type of renewable energy investment necessary to catapult the United States towards energy independence and international leadership in the renewable energy market.[56]

## II. SUPPLEMENTING RPS: SECURING ENERGY INDEPENDENCE THROUGH FEED-IN TARIFFS

### *Feed-in Tariffs Defined*

A FIT is a policy mechanism that requires electric utilities to purchase electricity from renewable energy developers, which the utility must usually interconnect to the grid.[57] The utilities purchase electricity at a fixed price for the life of the FIT contract, which is generally a period of 10-20 years.[58] Prices are typically set according to one of two models: a Value-Based Model or a Cost-Based Model.[59] A value-based approach

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[53] Kopetsky, *supra* note 23, at 959.
[54] WISER & BARBOSE, *supra* note 12.
[55] ROSE & MEEUSEN, *supra* note 44.
[56] Davies, *supra* note 35, at 1372.
[57] Rickerson et al., *supra* note 15, at 73.
[58] JULIE TAYLOR, THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, FEED-IN TARIFFS (FIT) FREQUENTLY ASKED QUESTIONS FOR STATE UTILITY COMMISSIONS 1 (2010).
[59] CORY ET AL., *supra* note 27, at 2.

attempts to define the value of renewable energy, which predictably creates administrative complexity due to the challenges inherent in quantifying such factors as health and air quality impacts, climate mitigation, and effects on energy security.[60] The more battle-tested and successful of the two models is the cost-based model, which is employed by such clean energy powerhouses as Spain and Germany.[61] The cost-based model establishes a FIT rate pegged to the cost of generation and then adjusts the rate to allow for a reasonable rate of return on an investment.[62] This model is especially attractive because it guarantees investors a reasonable rate of return while eliminating the risk of investment, thus encouraging market participation.[63]

Of course, even when utilizing the cost-based model, a FIT's success ultimately depends on what rate is selected.[64] Successful FITs set the fixed price at a rate high enough to spur investors to enter the market and invest in renewable energy development, with the hope that the investments will allow for the broader adoption of renewable technologies through economies of scale and increased efficiency.[65] To offset the high rates meant to attract investors, however, the excess costs must be passed on to electricity ratepayers.[66] For this reason, it is equally important to keep FIT rates low enough such that electricity rates do not significantly increase.[67]

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[60] *Id.* at 2-3.
[61] In fact, most successful European FITs employ the cost-based model. However, value-based FITs have emerged in the United States. *Id.* at 2, 4 n.5. For instance, California has implemented a value-based FIT. TAYLOR, *supra* note 58, at 5.
[62] CORY ET AL, supra note 27, at 2.
[63] *Id.*
[64] *See* Grinlinton & Paddock, *supra* note 17.
[65] *Id.*
[66] *Id.*
[67] *Id.*

That FITs involve fixed prices does not mean that a rate is set in stone for the full length of a contract. Most successful FITs are adjusted periodically to account for economic volatility and are frequently framed so that the rate is stepped down over the length of the contract to reflect expected technological innovations and lower costs related to renewable generation.[68] Italy, for instance, configured its FIT such that the rate in 2008 would decline by two percent each year in 2009 and 2010, and the FIT rate would be eligible for reconsideration after 2010.[69]

In addition to a finely calculated rate, FITs also require specific megawatt caps that limit the amount of renewable energy generated.[70] This is primarily because absent such caps, a developer may develop too much renewable energy,[71] which the utility would then be compelled to interconnect to the grid.[72] As a result, consumer prices for electricity would rise significantly because utilities would be forced to recover whatever they could for the renewable energy developed in excess of anticipated capacity.[73] Although the notion of limiting renewable energy generation may seem counterintuitive to the ultimate goal of generating more renewable energy, it is necessary to place such caps on generation because the initial cost to consumers under a FIT is ordinarily higher than the cost later in the term of the contract due to economies of scale and advancements in renewable energy generation.[74] Indeed, this is the basis for the tariff degression that is

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[68] Rickerson et al., *supra* note 15, at 74; Grinlinton & Paddock, *supra* note 17, at 947.
[69] Grinlinton & Paddock, *supra* note 17, at 947.
[70] *Id.*
[71] *Id.*
[72] Rickerson et al., *supra* note 15, at 73.
[73] *See* Grinlinton & Paddock, *supra* note 17, at 947.
[74] TOBY D. COUTURE, KARLYNN CORY, CLAIRE KREYCIK & EMILY WILLIAMS, NATIONAL RENEWABLE ENERGY LABORATORY, A POLICYMAKER'S GUIDE TO FEED-IN TARIFF POLICY DESIGN 100 (2010).

common to most FITs.[75] It is only after costs have decreased and renewable operations are optimized that such caps can be expanded and perhaps even removed altogether.[76] In the short term, however, generation caps are necessary to control renewable energy costs.[77]

*The Emergence of FITs in the United States*

Although RPS policies have been, and still are, the law of the land in the United States, FITs have begun to develop a presence in the country as well. In February 2009, Gainesville, Florida became the home of the first American FIT policy to mimic the European cost-based FIT model.[78] The Gainesville tariff focuses on solar energy and allows developers to recover the cost of renewable development plus a stipulated return of 5-6%.[79] In May 2009, Vermont followed suit, passing the first statewide FIT legislation in the United States.[80] Vermont's tariff allows for projects up to 2.2 megawatts in capacity, with contracts for up to 25 years and a total cap of 50 megawatts.[81] In September 2009, both California[82] and Hawaii[83] also authorized FITs.

In addition to the above-mentioned states, other states have demonstrated a keen interest in the promise of FITs. In 2009, Oregon initiated a pilot FIT program targeting

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[75] *Id.*
[76] *Id.*; Grinlinton & Paddock, *supra* note 17.
[77] COUTURE ET AL., *supra* note 74; Grinlinton & Paddock, *supra* note 17.
[78] CORY ET AL., *supra* note 27, at 9.
[79] *Id.*
[80] Bradley Motl, Comment, *Reconciling German-Style Feed-in Tariffs with PURPA*, 28 Wis. Int'l. L.J. 742, 755 (2011).
[81] *Id.*
[82] Grinlinton & Paddock, *supra* note 17, at 970.
[83] Motl, *supra* note 80, at 757.

the integration of solar energy into the grid.[84] Michigan also initiated a similar pilot program for solar energy in 2009.[85] Many other states have at least begun to give serious consideration to FIT legislation.[86]

Although FITs remain the exception to the rule, their emergence at the state level suggests that the United States may be growing more hospitable toward alternatives to RPS.[87] But, as long as FITs continue to gain traction only through scattered state efforts, the United States will only manage to preserve the status quo. Existing RPS policies and the emergence of state FITs have set the table, but those efforts can only take the United States so far. The United States must enact a national FIT that will not only ensure that every state is contributing to national energy independence and security, but will also position the United States as a progressive leader in renewable energy development in the future.

## III. POSITIVE MOMENTUM: SUPPLEMENTING EXISTING RPS POLICIES WITH A NATIONAL FIT

While states have begun to adopt FITs in addition to existing RPS in the United States,[88] the federal government has been idle, leaving to the states what should be a

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[84] Grinlinton & Paddock, *supra* note 17, at 971.
[85] *Id.*
[86] Motl, *supra* note 80; WILSON RICKERSON, FLORIAN BENNHOLD & JAMES BRADBURY, FEED-IN TARIFFS AND RENEWABLE ENERGY IN THE USA – A POLICY UPDATE 3 (2008).
[87] *See* CORY ET AL., *supra* note 27, at 1; Motl, *supra* note 80, at 755-57; Grinlinton & Paddock, *supra* note 17, at 970-71.
[88] See CORY ET AL., *supra* note 27, at 1; Motl, *supra* note 80, at 755-57; Grinlinton & Paddock, *supra* note 17, at 970-71.

national effort to achieve energy independence and security.[89] The United States must take advantage, however, of the positive momentum FITs have achieved of late. International successes,[90] coupled with the recent emergence of FITs domestically,[91] suggest that the political climate is ripe—and who knows for how long—for a more progressive and ambitious energy policy. Accordingly, the United States should act now and establish a national FIT that works alongside existing state RPS policies to propel the United States to the forefront of clean energy technology.

*FITs: An Untapped Resource*

There are several reasons why FITs are the most prevalent renewable energy policy in the world,[92] yet it appears that there are few reasons why the United States has yet to wholly commit to the policy mechanism. First and foremost, the United States' has largely refused to acknowledge the comparative advantages of FITs with respect to RPS mechanisms. Second, this refusal has been compounded by the United States' general pessimism about the potential for success for FITs in the United States.[93] FITs have numerous advantages over RPS, however, and a substantial track record of success that suggests that the United States, although late to the party, would be wise to grab a seat.

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[89] Rickerson et al., *supra* note 15, at 79.
[90] *Id.* at 75.
[91] See CORY ET AL., *supra* note 27, at 1; Motl, *supra* note 80, at 755-57; Grinlinton, *supra* note 17, at 970-71.
[92] Rickerson et al., *supra* note 15, at 73.
[93] *See* Grinlinton & Paddock, *supra* note 17, at 947-48; Xiaodong Wang, *Legal and Policy Frameworks for Renewable Energy to Mitigate Climate Change*, 7 Sustainable Dev. L. & Pol'y 17, 18 (2007); Rickerson et al., *supra* note 15, at 77, 79. Another reason the United States has yet to commit to a national FIT is related to the value for federalism in the United States. This issue will be discussed in Part V.

One of the main advantages of FITs is that, by fixing a price for a long duration of time (usually 10-20 years) and accounting for the cost of the particular type of energy generated, FITs remove a critical factor contributing to investor risk and replace it with a guaranteed reasonable profit on investment, thereby encouraging investors to develop diverse renewable technologies.[94] This allows investors to achieve a heightened level of security in their investments that is unattainable through RPS policies because RPS mechanisms lack fixed prices and the rates are set by market forces rather than by the government.[95] The increased risk associated with RPS policies also creates upward pressure for investors on the returns needed to make investments profitable.[96] As a result, FITs are more cost efficient in terms of average cost per kilowatt hour paid for renewable energy generation than RPS policies.[97]

Compared with RPS policies, FITs also generally spur more rapid development of renewable energy and cause a faster reduction of renewable energy costs over time.[98] Additionally, FITs provide much greater grid parity than RPS policies because FIT rates are based on the cost of generation and therefore do not discourage investors from developing more expensive renewable technologies.[99] This means that FITs would allow for the United States to cultivate a more diverse portfolio of renewable technologies than RPS policies currently allow.[100]

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[94] TAYLOR, *supra* note 58.
[95] *Id.* at 3.
[96] Grinlinton & Paddock, *supra* note 17, at 948.
[97] *Id.*
[98] Motl, *supra* note 80, at 746; Wang, *supra* note 93.
[99] Grinlinton & Paddock, *supra* note 17.
[100] Currently, solar energy is not competitive in the marketplace in the United States because it is more costly to generate. *Id.*

Employing FITs in the United States would also contribute significantly to the economy because FITs are proven job creators, to which Germany can certainly attest. In 2006 alone, Germany increased the number of jobs in the renewable energy sector by fifty percent from 2004.[101] Germany also oversaw a 12% increase in employment in the renewable energy sector from 2007 to 2008, which marked a net increase of 73% since 2004.[102] As of 2009, Germany created approximately 300,000 jobs in the renewable energy sector.[103] With its Green Energy and Green Economy Act, Ontario expects to find similar success in job creation.[104] Ontario expects to create anywhere from 50,000 jobs to 90,000 jobs per year over the FIT's first three years.[105]

*Addressing the Critics*

Among the chief criticisms of FITs are that: (1) they typically require high up-front costs in order to develop renewable energy;[106] (2) it is difficult to establish an appropriate rate;[107] (3) they burden ratepayers with excessive costs; (4) they act contrary to the market-focused tradition in the United States; (5) they are not flexible enough to react to market and technological changes; and (6) too much time and political capital has already been invested in RPS mechanisms to call for a shift to FITs now.[108] Each of these criticisms, at least in part, contributes to the pessimism about the ability of FITs to dramatically change the course of the United States' renewable energy policy.

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[101] Steven Ferrey, Chad Laurent & Cameron Ferrey, *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 Duke Envtl. L. & Pol'y F. 125, 172 (2010).
[102] Grinlinton & Paddock, *supra* note 17, at 952.
[103] Streich, *supra* note 40, at 431.
[104] *Id.* at 445.
[105] *Id.*
[106] Grinlinton & Paddock, *supra* note 17, at 948.
[107] Wang, *supra* note 93; Grinlinton & Paddock, *supra* note 17, at 947.
[108] Rickerson et al., *supra* note 15, at 77, 79.

Although it is true that FITs typically require high up-front costs and that it can be difficult to establish a rate that is both sensitive to ratepayers and encouraging to investors,[109] these issues can be effectively accounted for in the design and implementation of a FIT. For instance, high up-front costs under FITs certainly pose a challenge to renewable energy development.[110] These up-front costs, however, also address high initial experience curves, thereby reducing overall policy cost in the long-term by spurring a more rapid decline in the experience curve and inspiring technological advances sooner.[111] Furthermore, these costs can be accounted for through sound rate-setting based on the cost of generation.[112] Although it is no doubt difficult to set an appropriate rate, thoughtful assessments of the cost of the particular project, licensing and permit costs, operation and maintenance costs, inflation, interest rates, and investor profit margins can help determine the proper rate.[113] Additionally, safeguards such as periodic reassessment of tariff rates can help ensure that the rates at any given time are not out of sync with market realities.[114]

But, with regard to at least some of these criticisms, the jury is in fact still deliberating. For instance, though it has been argued that FITs are not cost-efficient and place an excessive burden on ratepayers, studies conducted by the European Union and British government reveal that, due to the increased investor security provided by FITs,

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[109] Grinlinton & Paddock, *supra* note 17, at 946, 948.
[110] *Id.* at 948.
[111] Rickerson et al., *supra* note 15, at 77-78.
[112] Ferrey et al., *supra* note 101, at 170-71.
[113] TAYLOR, *supra* note 58, at 6.
[114] COUTURE ET AL., *supra* note 74, at 90-91.

they are actually more cost-efficient than RPS.[115] Capital costs, or the costs necessary to make a particular project operational, for instance, are significantly lower under FITs than under RPS policies because the lower investor risk associated with FITs allows for investors to secure capital at lower interest rates than are possible through RPS policies.[116] As a result, the lower capital costs associated with FITs can offset any necessary rate hikes to ratepayers such that the overall policy cost is either equal to or less than the cost under RPS policies.[117] Moreover, because FITs facilitate early investment in renewable technology, rather than a gradual introduction of capital to develop the necessary infrastructure or the investment in emerging technologies only when least-cost alternatives are exhausted, the experience curve for renewable technologies declines more rapidly under FITs than under RPS, thereby reducing overall costs as technologies are optimized faster.[118]

The perception that FITs are contrary to the market-focused tradition of regulation in the United States is also misguided. As a principal matter, both RPS policies and FITs are created by the government. The difference is that with RPS policies, the government sets the quantity of electricity to be supplied, with the rate set by the market, whereas with FITs, the government sets the price and allows the market to determine the quantity

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[115] Rickerson et al., *supra* note 15, at 77.
[116] ANNE HELD, MARIO RAGWITZ, CLAUS HUBER, GUSTAV RESCH, THOMAS FABER & KATARINA VERTIN, FRAUNHOFER INSTITUTE SYSTEMS AND INNOVATION RESEARCH, FEED-IN SYSTEMS IN GERMANY, SPAIN AND SLOVENIA: A COMPARISON 26-27 (2007), *available at* http://www.feed-in-cooperation.org/wDefault_7/download-files/research/IFIC_Comparison-FITS-systems-in-DE-ES-SL_2010_final.pdf
[117] Rickerson et al., *supra* note 15, at 77-78; Ferrey et al., *supra* note 101, at 171-73.
[118] Rickerson et al., *supra* note 15, at 77-78.

of electricity to be supplied.[119] In this sense, the market plays a fundamental role under both policy initiatives.[120]

FITs are also improperly seen as rigid, inflexible policy mechanisms, insensitive to technological and market changes, when in fact, built into most FITs are provisions for periodic reassessment of tariff rates and tariff degression.[121] Periodic tariff reassessments ensure that tariffs reflect, as accurately as possible, technological and market realities.[122] Tariff degression accomplishes the same goal by anticipating technological advances and cost reductions ahead of time so that the tariff rate remains in step with market and technological realities.[123] Taken together, such measures allow FITs the flexibility necessary to respond to changing conditions in the marketplace.[124]

It has also been argued that regardless of the issues just discussed, the United States has already committed to RPS and that it should therefore see those policies through to their end.[125] This argument unnecessarily relies on the mutual exclusivity of FITs and RPS mechanisms, however.[126] Although countries in Europe have typically implemented a unitary energy policy,[127] differences between national priorities and makeup would entirely justify a hybrid approach in the United States. It is simply not true that FITs and RPS policies cannot coexist.[128]

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[119] *Id.* at 77; Ferrey et al., *supra* note 101, at 173.
[120] *See* Rickerson et al., *supra* note 15, at 77.
[121] Motl, *supra* note 80, at 745-46.
[122] COUTURE ET AL., *supra* note 74, at 6.
[123] *Id.*
[124] *See* Rickerson et al., *supra* note 15, at 77; COUTURE ET AL., *supra* note 74, at 6.
[125] Rickerson et al., *supra* note 15, at 79.
[126] *Id.*
[127] *Id.*
[128] *Id.*

*Teamwork: How FITs and RPS Policies Can Work Together*

Although European nations have largely considered FITs and RPS policies as mutually exclusive mechanisms due to the political pressure in Europe to harmonize renewable energy policies, early experience in the United States suggests that the two mechanisms cannot only coexist, but can thrive when working alongside one another.[129] Because FITs set a price for renewable energy and let the market determine quantity, whereas RPS policies set a quantity and let the market determine price,[130] FITs can actually be used to complement existing RPS policies by securing a procurement mechanism through which renewable energy can be developed.[131] By offering greater investment security to investors, FITs would draw more developers into the renewable energy generation market.[132] These investors would then produce energy under the FIT that could be used to meet the state's RPS goal.[133] For example, imagine a state RPS policy that required 25% of the electricity a utility purchased to be from renewable energy resources. Then imagine that, in addition to this state RPS policy, there was also a FIT that encouraged solar energy development—which is currently not a competitive resource because it is expensive to generate.[134] Under this scenario, any investor who is now drawn into the market by the FIT would contribute to the state's overall renewable

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[129] *Id.* at 74-75, 79. For instance, California, Washington, and Oregon use their FIT policies to develop smaller scale projects, while leaving their RPS policies to develop utility-scale projects. TOBY COUTURE & KARLYNN CORY, NATIONAL RENEWABLE ENERGY LABORATORY, STATE CLEAN ENERGY POLICIES ANALYSIS (SCEPA) PROJECT: AN ANALYSIS OF RENEWABLE ENERGY FEED-IN TARIFFS IN THE UNITED STATES 22 (2009).
[130] Brian Jansen, *Community Wind Power: Making More Americans Energy Producers Through Feed-in Tariffs*, 20 Kan. J. K. & Pub. Pol'y 329, 347 (2011).
[131] COUTURE ET AL., *supra* note 74, at 15.
[132] *Id.*
[133] TAYLOR, *supra* note 58, at 2.
[134] Grinlinton & Paddock, *supra* note 17, at 945-46.

energy generation by producing solar energy. This solar energy could then be counted towards the 25% goal set by the state RPS policy. Thus, RPS policies would essentially set a quantity goal and FITs would help states meet that goal by providing an additional revenue stream that could be used to deploy more renewable energy.[135]

Indeed, FITs cannot only help realize many of the goals under RPS policies, but they can also bring along other positives of their own that would otherwise be unattainable. For example, FITs can secure an energy supply for RPS policies in ways that RPS policies, by themselves, cannot because FITs provide long-term investment security for investors.[136] FITs would also allow utilities to account for potential project delays and cancellations because FITs, unlike RPS policies, establish a price correlated to the specific criteria set out for renewable energy procurement.[137] As a result, utilities can select developers from a pool of qualified applicants based solely on their ability to meet project criteria–because price is constant–rather than selecting developers based on which developers propose meeting the criteria at the lowest possible price, which can cause project uncertainty if developers misestimate their ability to complete a project.[138] This allows utilities to weed out weaker projects and thereby allow only the best and most reliable projects to move forward.[139]

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[135] TAYLOR, *supra* note 58, at 2.
[136] CORY ET AL., *supra* note 27, at 10.
[137] *Id.* at 9-10.
[138] *See id.*
[139] *Id.*

FITs can also provide valuable support for emerging technologies that are more or less ignored under RPS policies.[140] Because RPS policies encourage investors to compete to provide renewable energy at the lowest possible price, investors are hesitant to invest in emerging technologies because their bids for projects, in an attempt to offer the lowest possible price, might not sufficiently account for the higher up-front costs and risks associated with emerging technologies.[141] FITs, on the other hand, account for the risk and up-front costs of emerging technologies when setting the rate for the specific technology.[142] As such, FITs better provide investors with the security they need to invest in emerging technologies.[143]

*Going National in Scope*

There is nothing wrong with allowing states to solve state problems through state-created solutions. Renewable energy development in the United States, however, is not a merely a state problem; it has tremendous economic, environmental, and national security implications for the entire nation, and the piecemeal, state-by-state approach utilized thus far leaves a lot to be desired.[144] Although it may be argued that a national policy would strip states of their flexibility and freedom to design policies as they see fit,[145] committing to a national policy to develop renewable energy can open many doors to more widespread clean energy development and adoption—as the experiences of both

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[140] *Id.*
[141] *See id.*; COUTURE ET AL., *supra* note 129, at 23.
[142] CORY ET AL., *supra* note 27, at 9-10.
[143] *Id.*
[144] Davies, *supra* note 35, at 1370-75.
[145] Kopetsky, *supra* note 23, at 958, 976-77.

Germany[146] and Spain[147] demonstrate. Not only does a national policy show a commitment to renewable energy development by setting ambitious goals for the nation's people to strive toward, but it also standardizes the approach to development, asserts national priorities, and ensures that every part of the country is doing its part to contribute to long-term energy sustainability. [148]

One of the principal benefits of a national policy is that it would eliminate state free riders that do not enact any renewable energy policy but nonetheless enjoy the benefits made possible by other states enacting renewable energy policies.[149] Many states have elected not to institute a renewable energy policy to date because renewable energy has been left to the states without federal mandates or guidance on the matter.[150] As a result, while some states bear the costs of promoting renewable energy development by paying their dues for the benefits they receive, other states simply enjoy the benefits—such as reduced national security costs, lower and steadier fossil fuel prices, and reduced greenhouse gas emissions—without sharing in the costs.[151] Imposing a national policy, however, would ensure every state has at least some policy that contributes to renewable energy development in the United States.[152]

By eliminating the free rider problem, a national policy would also allow for an increase in the total amount of renewable energy produced in the United States, a reduction in environmental pollutants, a more robust economy, and an improved national

[146] Streich, *supra* note 40, at 431-32.
[147] Ferrey et al., *supra* note 101, at 171-72.
[148] Davies, *supra* note 35, at 1366-67.
[149] Welton, *supra* note 9.
[150] *Id.*
[151] *Id.*
[152] Davies, *supra* note 35, at 1366-67.

security landscape.[153] Indeed, uniting the nation on the clean energy front would serve as a catalyst for a chain reaction of benefits that the entire nation could enjoy. Because the entire nation, rather than only a portion of the states, would be developing renewable energy, the total amount of renewable energy produced in the United States would increase.[154] This would, in turn, allow for fewer environmental pollutants and greenhouse gas emissions because the country would become less reliant on environmentally unfriendly technologies such as fossil fuels.[155] This decreased reliance would also contribute to energy independence because the United States would be able to satisfy more of its need for energy through domestically produced renewables rather than relying on foreign oil.[156] Increased energy independence would then improve national security because as the United States becomes less reliant on foreign resources, it can free itself from trade relationships with politically unstable nations.[157]

National renewable energy policies would also allow for more widespread job creation throughout the United States. From 1998 to 2007, the clean energy sector added approximately 770,000 jobs at a rate that was 2.5 times faster than job increases overall.[158] These numbers indicate that even without a national renewable energy policy, the clean energy sector was experiencing growth.[159] These numbers only tell half the story, however. As underscored by the previous discussion of the free rider problem, not every state has established a state renewable policy; therefore, not every state has

[153] *Id.* at 1370-75.
[154] *Id.* at 1366-67.
[155] *Id.* at 1370-71.
[156] *Id.* at 1372-73.
[157] *Id.*
[158] THE PEW CHARITABLE TRUSTS, *supra* note 5, at 13.
[159] *Id.*

contributed to job growth in the clean energy sector.[160] A national renewable energy policy would allow the United States to reach this unfulfilled job-creating potential because it would draw every state into the clean energy sector, creating jobs nationwide rather than only in states choosing to institute a renewable energy policy on their own.[161]

## IV. DESIGNING A FIT-TING NATIONAL POLICY

The United States would not be starting from scratch were legislators to set their sights on designing a national FIT. The international community, particularly Germany and Spain,[162] has already provided a blueprint for the United States to follow en route to its own national FIT. Indeed, this international foundation even inspired a domestic attempt to pass a nation FIT in the United States—Congressman Jay Inslee's (Washington) proposed national FIT—which aimed to not only develop more renewable energy in the United States, but also to put more Americans to work.[163]

Congressman Inslee's proposal for a national FIT mimics Germany's Erneuerbare-Energien-Gesetz (EEG) in most respects and therefore already boasts most, if not all, of the necessary features for a successful FIT policy. Like Germany's EEG,[164] Inslee's bill calls for guaranteed interconnection for renewable energy technologies,[165] use of the cost-

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[160] *See* Welton, *supra* note 9; Davies, *supra* note 35, at 1366-67.
[161] *See* Davies, *supra* note 35, at 1366-67.
[162] Ferrey et al., *supra* note 101, at 171; Grinlinton & Paddock, *supra* note 17, at 949, 952.
[163] Renewable Energy Jobs and Security Act, H.R. 5883, 111th Cong. (2010).
[164] FEDERAL MINISTRY FOR THE ENVIRONMENT, NATURE CONSERVATION AND NUCLEAR SAFETY, EEG – THE RENEWABLE ENERGY SOURCES ACT 24-25 (2007) available at http://www.folkecenter.net/mediafiles/folkecenter/pdf/eeg_success_brochure_engl.pdf.
[165] H.R. 5883 § 101 (proposing to amend the Federal Power Act, 16 U.S.C. § 824 (2010), by adding § 210A, which, among other things, requires priority interconnection).

based model for rate-setting,[166] periodic review of feed-in rates,[167] and tariff degression.[168] Inslee's bill also calls for a fixed tariff for a period of twenty years,[169] a feature also found in the German EEG policy.[170] Despite Inslee's efforts to bring Germany's successes to the United States, however, his bill repeatedly failed to become law.[171] This failure is potentially attributable to the fact that the law aims to do too much too soon, without giving legislators, and their constituents, time to observe and acknowledge the benefits of FITs.

*The Renewable Energy Jobs and Security Act: Too Much, Too Soon*

Just as Rome was not built in a day, legislators cannot reverse a history of leaving renewable energy policy to the states in one fell swoop. Although there is little doubt that Inslee's proposal for a national FIT established an important precedent in the battle for a national renewable energy policy and raised the level of discourse about the feasibility of a national FIT in the United States, the current version of the bill is simply too ambitious to realistically become law at the present time. But, perhaps this does not have to be the case. The Renewable Energy Jobs and Security Act is a strong bill; it needs only minor adjusting to have a better chance of making it through Congress en route to becoming a law.

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[166] H.R. 5883 § 202 (proposing to amend the Federal Power Act, 16 U.S.C. § 824 (2010), by adding § 210B, which, among other things, requires a reasonable rate of return on investments no lower than 8%); § 203 (proposing to amend the Federal Power Act, 16 U.S.C. § 824 (2010), by adding § 224, which, among other things, requires cost reimbursement for state utilities).
[167] H.R. 5883 § 202.
[168] *Id.*
[169] *Id.*
[170] FEDERAL MINISTRY FOR THE ENVIRONMENT, *supra* note 164, at 7.
[171] *See* H.R. 5883.

Taken as a whole, the primary issue with Inslee's proposal is its overly ambitious, yet sometimes cursory, nature. For example, in suggesting that FERC set a uniform national rate,[172] Inslee neglected to clearly articulate the constitutional basis giving FERC the authority to set such a rate. Such a clear articulation is critical because renewable energy development has long been within the purview of the states and the states would surely resist a national FIT as an unlawful encroachment on state autonomy.[173]

The uniform national rate is also problematic because it fails to account sufficiently for regional differences in generation capacity.[174] Under the current system, states have the freedom to set their own renewable energy policies, which comes with the concurrent ability to assess renewable generation capabilities and set reasonable goals for development.[175] Although Inslee proposes that the Secretary of Energy, acting through the National Renewable Energy Laboratory, submit a report every two years that will inform the rate-setting process,[176] it is unclear how such information would ultimately alter the fact that certain states (i.e. Arizona) have greater potential for solar energy development than other states (i.e. Michigan). A uniform national rate is untenable because it artificially places all states on an equal playing field in terms of their ability to generate various types of renewable energy.

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[172] H.R. 5883 § 202.
[173] Grinlinton & Paddock, *supra* note 17, at 969.
[174] RICKERSON ET AL., *supra* note 86, at 13.
[175] *Id.*
[176] Inslee's proposal calls for a report that explains the details of the investment market as it relates to renewable energy project financing, includes maps of national renewable energy resources and cost assessments for facility development for all technologies, and provides recommendations for minimum tariff rates. H.R. 5883 § 201.

The fact that the uniform national rate is differentiated by technology, the year the installation is placed into service, and the size of the system[177] also raises feasibility concerns. The United States' overwhelming reliance on RPS[178] makes the implementation of any new policy, including one that functions as a complement to the existing RPS framework, difficult to accomplish. There is not only an awareness hurdle to overcome because legislators and their constituents are either unaware or skeptical of FITs and how they work,[179] but also an experience hurdle based on the fact that there is limited experience with FITs on the state level[180] and absolutely no experience with FITs on the federal level.[181] Ignoring these realities, Inslee's proposal ambitiously calls for a national FIT that requires setting different national rates for each type of technology.[182] Such a framework requires legislators to not only set various rates correctly, which as discussed previously, can be a difficult task,[183] but also to set the rates at such levels that they can apply uniformly throughout the country despite regional differences in generation capacity. Such challenges stack the odds against Inslee's proposed bill becoming law.

Further complicating matters is the implementation and reimbursement mechanisms that Inslee proposes in his bill. Inslee proposes that the federal government implement the FIT by levying a systems benefit charge, set by FERC and based on

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[177] H.R. 5883 § 202.
[178] WISER ET AL., *supra* note 12, at 3.
[179] Rickerson et al., *supra* note 15, at 77-79.
[180] Though many states have expressed interest in exploring FITs, only a handful of states have actually enacted FIT legislation. Grinlinton & Paddock, *supra* note 17, at 969-972.
[181] Ferrey, *supra* note 101, at 175.
[182] H.R. 5883 § 202.
[183] Grinlinton & Paddock, *supra* note 17.

energy usage,[184] on all consumers. The charge ostensibly functions as a variable tax on consumers that reimburses utilities for the costs in purchasing, interconnecting, and transmitting renewable energy.[185] The revenue generated by the national systems benefit charge would then be transferred to a national renewable energy corporation called *RenewCorps*, which would distribute the revenue within each region of the North American Electric Reliability Corporation (NERC) in the United States in proportion to the revenue raised within each region.[186] At least two problems arise, however, in this implementation and reimbursement framework.

First, implementing the FIT through a national systems benefit charge would mean essentially implementing a national tax to fund renewable energy development,[187] which could draw resistance from taxpayers across the country as a sign that "Big Government" is interfering too much with state functions. A second, and perhaps more significant, problem is that Inslee's plan to use *RenewCorps* to avoid depositing the revenue from the national systems benefit charge into the Treasury did not actually solve the problem. Inslee proposed to create *RenewCorps* in order to avoid having FERC manage the revenue from the systems benefit charge, which FERC, as a federal government entity,

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[184] H.R. 5883 § 203.
[185] *Id.*
[186] United States Renewable Energy Jobs and Security Act, H.R. 5883, 111th Cong. §203 (2010). There are eight region entities in the North American Electric Reliability Corporation: 1) Florida Reliability Coordinating Council (FRCC); 2) Midwest Reliability Organization (MRO); 3) Northeast Power Coordinating Council (NPCC); 4) Reliability*First* Corporation (RFC); 5) SERC Reliability Corporation (SERC); 6) Southwest Power Pool, RE (SPP); 7) Texas Reliability Entity (TRE); and 8) Western Electricity Coordinating Council (WECC). *Regions and Balancing Authorities*, NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION (Apr. 12, 2011), http://www.nerc.com/docs/oc/rs/BubbleMap_2011-04-12.jpg.
[187] *See* RICKERSON ET AL., *supra* note 86, at 13 (noting that the systems benefit charge would appear as a transparent line item on each electric customer's bill).

would have been required to deposit into the Treasury.[188] If the revenue from the systems benefit charge were deposited into the Treasury, then utilities seeking to recover the costs incurred under the FIT would potentially have to wait for Congressional appropriations before they could recoup their investments, which results in increased risk because Congressional appropriations for any fiscal year are not guaranteed.[189] Moreover, any failure by utilities to recoup their investment could lead to downstream rate increases for consumers because utilities would look elsewhere to recover their investment.[190] Accordingly, Inslee's approach was to circumvent the Treasury by channeling revenue through *RenewCorps*, an independent corporation, which would ostensibly be free from any requirement to deposit the revenue into the Treasury.[191]

But, as the Fourth Circuit demonstrated in *Motor Coach Industries, Inc. v. Dole*, channeling money through an independent corporation is not sufficient to strip funds of their public nature.[192] In *Motor Coach*, the Federal Aviation Administration (FAA) hoped to purchase buses to encourage greater use of Dulles International Airport.[193] Rather than requesting additional appropriations from Congress, the FAA entered into agreements with various airlines under which the FAA would waive various fees it would have otherwise charged in exchange for the airlines funding a private trust that would be used to purchase buses.[194] In determining whether the ostensibly private trust was

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[188] *See id.* at 12 n.14.
[189] *Id.*
[190] *See id.*
[191] *Id.* at 12, n.14.
[192] *Motor Coach Indus., Inc. v. Dole*, 725 F.2d 958, 960 (4th Cir. 1984).
[193] *Id.*
[194] *Id.* at 961.

created with public funds, the Court stated that it was necessary to consider the totality of factual circumstances surrounding its creation—considering, at a minimum,

> "the purposes for which the trust was established, the public or private character of the entity spearheading the trust's creation, the identity of the trust's beneficiary and administrators, the degree of control exercised by the public agency over disbursements and other details of administration, and the method by which the trust is funded."[195]

Finding that the FAA played a prominent role in the trust's administration, the Court held that the trust and its assets were public in character.[196]

As the Fourth Circuit's analysis in *Motor Coach* indicates, the mere fact that Inslee proposes to channel the revenue generated from the systems benefit charge through *RenewCorps* does not strip the funds of their public nature.[197] Rather, the criteria from *Motor Coach* suggest that the systems benefits charge revenue is public money that must still be deposited into the Treasury and subjected to appropriations.[198] First, the purpose for which *RenewCorps* was created was to distribute public money for a public purpose, namely renewable energy generation.[199] Second, because Congress would presumably be the body creating *RenewCorps*, it is clear that a public body would be spearheading the creation of *RenewCorps*.[200] Third, *RenewCorps* is subject to FERC oversight, which makes its administration in the hands of a public entity.[201] Fourth, FERC exercises significant control over *RenewCorps* because FERC is the body in charge of setting the

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[195] *Id.* at 964-65.
[196] *Id.* at 965.
[197] *See id.* at 960.
[198] *See id.* at 965.
[199] *See id.* at 965; H.R. 5883 § 203.
[200] *See Motor Coach*, 725 F.2d at 965; H.R. 5883 § 203.
[201] *See Motor Coach*, 725 F.2d at 965; H.R. 5883 § 203.

national systems benefit charge that leads to the revenue ultimately to be distributed.[202] Finally, *RenewCorps* is charged with redistributing a systems benefit charge, which for all intents and purposes is a national tax.[203] Consequently, Inslee's proposal to create *RenewCorps* to circumvent the appropriations process is ultimately insufficient because *RenewCorps* is still dealing with public money, which must be deposited into the Treasury. Thus, even with the creation of *RenewCorps*, utilities would still face the risk of not being able to recover compliance costs.[204]

*The Renewable Energy Jobs and Security Act Revisited: Modifying Inslee's Bill*

Congressman Inslee's national FIT bill got the ball rolling on a more progressive and national renewable energy policy. As the previous section highlighted, however, the bill has weaknesses, many of which may have directly contributed to the bill's failure thus far to become law.[205] With modifications aimed at narrowing the scope of the bill and allowing states to retain more authority, Congressman Inslee's bill could have a better shot at becoming law. As always, a bill's potential for success will lie in the details of its implementation.

1. Adding a Jurisdictional Element

The first step to modifying Congressman Inslee's bill is to include a jurisdictional element within the bill that hooks the authority given to FERC to the Constitution, namely the Interstate Commerce Clause. FERC currently has jurisdiction over the transmission of electric energy in interstate commerce and the sale of electric energy at

[202] *See Motor Coach*, 725 F.2d at 965; H.R. 5883 § 203.
[203] *See Motor Coach*, 725 F.2d at 965; H.R. 5883 § 203.
[204] *See Motor Coach*, 725 F.2d at 960; RICKERSON ET AL., *supra* note 86, at 12 n.14.
[205] *See* H.R. 5883.

wholesale in interstate commerce.[206] This authority, however, is restricted to regulating wholesale energy rates; states retain the authority to regulate retail electric rates.[207] Congressman Inslee's bill, however, does not acknowledge the jurisdictional boundaries of FERC's authority.[208] By simply providing that FERC will set a uniform national FIT rate implemented by a national system benefits charge,[209] it is not altogether clear that FERC even has the authority to set a national FIT rate.

To remedy this situation, the bill should be modified to include a jurisdictional element grounding FERC's authority to set FIT rates in its statutory authority to regulate wholesale rates in interstate commerce. This element should clearly articulate that by setting a national FIT rate, FERC is only regulating wholesale electric rates, leaving retail electric rates to the states. The inclusion of such a jurisdictional element would not only help the bill pass Congressional scrutiny, but, as demonstrated in *United States v. Morrison*,[210] it would also bolster the legislation against constitutional attack. In *Morrison*, the Supreme Court found that had 42 U.S.C. § 13981 included a jurisdictional element establishing that the statute was enacted "in pursuance of Congress' regulation of interstate commerce," it would have supported the argument that the statute was "sufficiently tied to interstate commerce."[211] Because there was no such element, however, no such presumption could be made.[212] Accordingly, modifying Congressman

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[206] 16 U.S.C. § 824 (2010); Ari Peskoe, *A Challenge for Federalism: Achieving Nation Goals in the Electricity* Industry, 18 Mo. Envtl. L. & Pol'y Rev. 209, 219-20 (2011).
[207] 16 U.S.C. § 824; Grinlinton & Paddock, *supra* note 17, at 962.
[208] *See* H.R. 5883 §§ 202-203.
[209] *Id.*
[210] *See United States v. Morrison*, 529 U.S. 598, 612-14 (2000).
[211] *Id.*
[212] *Id.*

Inslee's bill to include a jurisdictional element, grounding FERC's authority to set a national FIT in its power to regulate wholesale electric rates in interstate commerce, would similarly bolster the legislation against constitutional attack.[213]

2. Abandoning Uniform National Rates in Favor of Regional Rates

In addition to modifying Inslee's bill to include a jurisdictional element, another necessary change is to abandon the uniform national rate in favor of regional rates that would be more sensitive to regional differences with respect to generation capacity. Inslee's proposed use of a uniform national rate creates too many problems regarding divergent generation capacities between states.[214] Simply put, a uniform national rate presupposes that a state like Michigan has the same potential to generate solar energy as a state like Arizona.[215] Although Inslee proposes that FERC would set the uniform rate based on a compilation of data provided by the Secretary of Energy through the National Renewable Energy Laboratory,[216] the bill still assumes that a possible rate exists that would be fair across the country, despite different generation capacities.

Instead, Inslee's bill should call for FERC to establish regional rates. Using, for instance, NERC's division of regions in the United States,[217] FERC could establish a different rate for each region. Such a modification would carry over Inslee's reporting requirement so that FERC would still be setting rates based on carefully compiled data.[218] By minimizing the scale of such rates from national to regional, however, rate-setting

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[213] *See id.*
[214] RICKERSON ET AL., *supra* note 86, at 13.
[215] *See id.*
[216] H.R. 5883 § 201.
[217] *See Regions and Balancing Authorities*, *supra* note 186 (listing NERC's eight regions).
[218] H.R. 5883 § 201.

could occur in a manner more sensitive to a particular region's capabilities, while still providing for a national renewable energy policy. Although this suggested course of action would require FERC to set various rates for a particular technology in order to account for each region, this path is still easier, or at least not more difficult, than setting a national rate fair to every state.

3. Narrowing the Range of Technologies Covered by the Bill

A third modification to Inslee's proposed bill would be to narrow the range of technologies covered by the legislation, which currently applies to a wide array of renewable energy sources such as solar thermal, solar photovoltaic, wind, geothermal, marine and hydrokinetic renewable energy, renewable biomass, landfill gas, biogas derived from farm waste, and qualified hydropower.[219] As state experience demonstrates, FITs are still a rarity at the state level, as RPS policies continue to outnumber FITs in the United States.[220] With his proposed legislation, however, Congressman Inslee attempts to gain too much ground too quickly. Inslee not only proposes a national FIT,[221] which would already be a drastic change from the state-by-state approach to renewable energy development, but he also wants the legislation to cover such a broad array of renewable technologies that the bill immediately overwhelms.[222] Calling for a national FIT that covers so many technologies means that FERC, which has not had experience

[219] H.R. 5883 § 4.
[220] WISER ET AL., *supra* note 12, at 3.
[221] H.R. 5883 § 201.
[222] H.R. 5883.

establishing national tariff rates,[223] must now set several rates across various technologies.[224]

Instead, Inslee's bill should be modified to reflect the monumental nature of national FIT legislation. Rather than covering the broad array of technologies proposed by Inslee,[225] the FIT should focus solely on solar energy, a renewable energy source that has largely been undeveloped in the United States because of the low-cost focus of RPS.[226] By narrowing its scope, the legislation becomes more manageable and easier to sell because of its focused and modest mission. Furthermore, the legislation would function as a trial run of sorts. If the FIT is as successful in the United States as it has been abroad,[227] then passing a more comprehensive FIT (covering a broader array of technologies) should be easier in the future. Moreover, because solar energy has been so underdeveloped in the United States thus far,[228] it is a wise renewable energy source to focus on. Not only would the legislation develop an energy source otherwise ignored, but the bill would allow for a stark comparison between RPS and FIT policies regarding their ability to develop a diverse energy portfolio.

4. Encouraging Public Utility Commissions to Incorporate the National FIT

A final measure to increase the likelihood that Congressman Inslee's bill becomes law is to modify the way the bill implements the FIT and reimburses utilities for the costs

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[223] Ferrey, *supra* note 101, at 175.
[224] H.R. 5883 § 202.
[225] H.R. 5883 § 201.
[226] Grinlinton & Paddock, *supra* note 17, at 945-46.
[227] Ferrey et al., *supra* note 101, at 171-72.
[228] Grinlinton & Paddock, *supra* note 17, at 945-46.

they incur. Rather than levying a national systems benefit charge, which would be set by FERC, on consumers according to energy usage,[229] Inslee's bill should be altered to condition the receipt of federal funding on states incorporating the national FIT into their existing retail rate structures ("incorporation provision"). The bill would essentially encourage compliance either by linking compliance with the FIT to the receipt of federal grants, or by imposing financial sanctions—such as the reduction or elimination of funding for certain programs—on states that do not comply with the FIT.[230] There is precedent for each of these methods[231] and thus the choice of which method could largely be left to the particular preferences of legislators, with the ultimate goal of getting enough legislators to sign off on the bill to make it a law.

In application, the federal mandate would still give states administrative freedom. State PUCs would incorporate the FIT as one of many factors that go into setting the retail rate to be charged to consumers. California's electricity retail rate, for instance, is set by factoring in generation costs, transmission costs, distribution costs, and a fair rate of return for the utility.[232] Under the incorporation provision, California would be required to additionally factor in compliance costs related to the national FIT. Such incorporation would be desirable for numerous reasons.

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[229] H.R. 5883 § 203.
[230] Robert L. McCurley, Jr., *Department: Legislative Wrap-Up: Federally Mandates State Legislation*, 66 Ala. Law. 456, 456 (2005).
[231] The No Child Left Behind Act imposes financial sanctions on states that do not comply with Federal mandates. *Id.* Additionally, the National Minimum Drinking Age Act, 23 U.S.C. § 158 (1984), conditions federal highway funds on states setting the minimum drinking age at 21. *Dole*, 483 U.S. at 205.
[232] *Frequently Asked Questions: How Your Electricity Bill is Calculated*, CALIFORNIA PUBLIC UTILITIES COMMISSION (July 26, 2010), available at http://www.cpuc.ca.gov/NR/rdonlyres/6AF20251-011C-4EF2-B99D-74CA315A4C40/0/RatesFAQ0710_3.pdf.

First, it would allow states to retain more control over how the national FIT affects consumers within the state because states will have discretion in how much they want to charge consumers. Rather than the federal government imposing a charge on all consumers,[233] state PUCs would have the discretion to charge consumers as much as they deem appropriate, likely charging enough to at least cover compliance costs. The increased flexibility given to states through this modification would likely appease critics of Inslee's bill to some extent because under his proposed system, FERC would set the rate, taking states out of the equation altogether.[234]

Second, eliminating the systems benefit charge and making state PUCs responsible for raising enough revenue to cover compliance costs eliminates the risk for utilities of waiting on congressional appropriations in order to recover compliance costs.[235] Under Inslee's bill, because the revenue generated by the national systems benefit charge is still federal public money, despite it being channeled through *RenewCorps*, the revenue must first go to the Treasury and then be appropriated before utilities can recover their costs.[236] This creates an unwarranted risk that utilities will not recover their costs or that consumers will be excessively charged so that utilities can recover those costs.[237] By eliminating the systems benefit charge and allowing state PUCs to recover costs on their own, the middle man is essentially removed. State PUCs would not have to wait for appropriations because the revenue meant to offset

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[233] *See* H.R. 5883 § 202.
[234] *See id.*
[235] *See* RICKERSON ET AL., *supra* note 86, at 12 n.14; *Motor Coach*, 725 F.2d at 960.
[236] *Id.*
[237] *Id.*

compliance costs would be dealt with directly by the states without passing through the Treasury.[238]

Third, replacing the systems benefit charge with a system in which state PUCs incorporate the national FIT rate into their retail rate structure removes the overly burdensome reimbursement process that Congressman Inslee proposes.[239] Because states, themselves, would be responsible for generating the revenue necessary to offset compliance costs, there would be no need for a national renewable energy corporation such as that proposed by Inslee. The process would, instead, be far simpler: FERC sets a FIT rate and state PUCs incorporate that rate into their existing retail rate structure by charging consumers accordingly.

Finally, eliminating the systems benefit charge would avoid what would likely be viewed as a federal tax on consumers to develop renewable energy. By leaving it to the states to recover costs by incorporating the national FIT into their existing retail structure, the individual states, rather than the federal government, would ultimately be responsible for raising revenue.

Adding these modifications to Congressman Inslee's bill would by no means shield the bill from all criticism. The changes would make the bill more likely to pass, however, because they acknowledge the uphill battle to enacting a national FIT and are recommended with the proper perspective in mind, namely that this bill, if enacted and proven successful, is just the beginning.

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[238] *See id.*
[239] H.R. 5883 § 203.

## V. THE REVISED RENEWABLE ENERGY JOBS AND SECURITY ACT: ADDRESSING CONSTITUTIONAL CONCERNS

Although the proposed modifications to Congressman Inslee's bill are intended to increase the likelihood that the bill becomes law, opponents of the revised bill might argue that the incorporation provision is unconstitutional because the federal mandate violates the Tenth Amendment.[240] This contention would likely be based on two propositions: (1) the federal government cannot seize state governments by directly compelling them to incorporate the national FIT into their existing retail rate structure;[241] and (2) the federal government cannot compel state employees to enforce federal law.[242]

*Contention 1: The Federal Government Cannot Seize State Governments by Directly Compelling State Action*

Critics of the incorporation provision may argue that by compelling state PUCs to incorporate the national FIT into their existing state electricity retail rate structures, the federal government would be unconstitutionally forcing states to enforce a federal regulatory program in violation of the Tenth Amendment. Relying on the Supreme Court's ruling in *New York v. United States*,[243] opponents of the provision would argue that the federal government would not be able to mandate that states incorporate the national FIT into their existing retail rate structures because such a mandate would force states to enforce the federal government's regulatory program, namely the FIT.

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[240] *See* U.S. CONST. amend. X.
[241] *See New York v. United States*, 505 U.S. 144, 149 (1992).
[242] *See Printz v. United States*, 521 U.S. 898, 902 (1997).
[243] *New York v. United States*, 505 U.S. at 149.

This line of reasoning, however, misses the mark because unlike in *New York v. United States*,[244] there is no state compulsion here. In *New York v. United States*, the federal government enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 to deal with the disposal of radioactive waste.[245] The Act contained a provision that required states to take title and assume liability for waste generated within their borders if they failed to comply with the disposal mandate.[246] The Supreme Court invalidated the provision because it was impermissibly coercive and a threat to state sovereignty.[247] The Court ruled that forcing states to choose between the two options was coercive and against federalism in the United States because the "take title" provision directly forced states to either comply with the federal statute or otherwise take title and assume liability for waste generated within its borders, neither of which Congress could constitutionally force states to do.[248]

With the revised national FIT, however, Congress would be *encouraging*, not compelling, states to incorporate the national FIT within existing electricity retail rate structures. Whether Congress conditions federal environmental grants on compliance or imposes sanctions by reducing or eliminating funding for certain environmental programs, the states would have the ultimate authority in deciding which path to follow. In *South Dakota v. Dole*, the Supreme Court explicitly approved such conditioning of

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[244] *See id.*
[245] *Id.*
[246] *Id.* at 152-54.
[247] *Id.* at 174-77.
[248] *Id.*

funding on state compliance with a federal regulatory scheme.[249] In *Dole*, the Court held that Congress could lawfully withhold 5% of federal highway funding where states did not comply with a federal statute setting the legal drinking age at twenty-one because such a condition merely placed pressure on states and did not reach the level of coercion.[250] The Court stated that Congress could indirectly pressure states to comply with a federal regulatory scheme so long as (1) the scheme promoted the general welfare; (2) the means of regulation were reasonably calculated to promote the welfare; (3) the conditions upon which the states were to receive funding were unambiguous; and (4) there were no other constitutional bars to the legislation.[251] Applying these conditions to the revised national FIT proposed here suggests that the FIT would survive this constitutional challenge.

First, conditioning federal environmental grant money to encourage state compliance with the revised national FIT promotes the general welfare because it would allow for the development of solar energy, a currently underdeveloped resource, and thereby diversify the United States' energy portfolio. It should also be noted that Congress is generally granted great deference in its determinations regarding general welfare.[252] Second, the regulatory mechanism is reasonably calculated to promote the general welfare because it promotes a national commitment towards renewable energy development while allowing state public utility commissions to retain authority to set electricity retail rates. Third, the bill would unambiguously condition funding on state

[249] *Dole*, 483 U.S. at 208-09.
[250] *Id.* at 211-12.
[251] *Id.* at 207-08.
[252] *Id.*

compliance with the national FIT and its requirements. Finally, there are no constitutional bars to enacting the national FIT legislation. Accordingly, the revised national FIT proposed here would likely survive the constitutional challenge just as the National Minimum Drinking Age Act survived in *Dole*.[253] As such, Congress would not be directly compelling states to comply with the national FIT and the proposed legislation would survive constitutional scrutiny.

*Contention 2: The Federal Government Cannot Compel State Employees to Enforce Federal Law*

A corollary to the above contention is that the federal government cannot compel state employees to enforce federal law. This principle is derived from the Supreme Court's decision in *Printz v. United States*, where the Court held that Congress cannot circumvent the prohibition against compelling states to enact or enforce a federal regulatory program by commandeering state employees directly.[254] In *Printz*, the Supreme Court found that multiple provisions of the Brady Handgun Violence Prevention Act were unconstitutional because they directly compelled state employees to enforce a federal law, for instance, by requiring law enforcement officers to conduct background checks on applicants for handguns.[255] The Court stated that such commandeering of state law enforcement officials would impermissibly augment the power of the federal government at the expense of state government.[256]

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[253] *Id.* at 211-12.
[254] *Printz*, 521 U.S. at 935.
[255] *Id.*
[256] *Id.* at 922.

Applying *Printz* to the revised national FIT proposed here, there would be no *Printz* problem because the federal government is not commandeering state employees.[257] The revised national FIT merely encourages state PUCs to consider an additional factor when performing their routine state function of setting retail electricity rates. This is very different from the circumstances in *Printz*, where the Brady Bill allowed the federal government to conscript state employees into federal service.[258] Unlike in *Printz*, here, the federal government is not pressing state employees into federal service because it is only *encouraging* state employees to consider an additional criterion when performing routine, state-orientated duties.[259] Consequently, the revised national FIT does not impermissibly commandeer state employees.

Thus, the federal government would not impermissibly seize state governments or compel state employees to enforce federal law by encouraging state public utility commissions to incorporate the national FIT into their existing retail rate structures. Because the federal government would only encourage, not compel, states and their employees to comply with the national FIT, the national FIT would again survive constitutional scrutiny.[260] Accordingly, Congress should pass the national FIT proposed here because it would provide the necessary impetus for greater renewable energy development in the United States without violating the Constitution.

## CONCLUSION

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[257] *See id*. at 922-23.
[258] *Id.* at 907-09.
[259] *Id.* at 922-23.
[260] *New York v. United States*, 505 U.S. at 174-77; *Dole*, 483 U.S. at 207-08; *Printz*, 521 U.S. at 922-23.

Although it remains an uphill battle to pass a national FIT in the United States, the emergence of FIT legislation on the state level suggests that FITs are at least gaining ground in the United States. Congressman Inslee's repeated efforts to enact national FIT legislation have already raised the level of discourse regarding not only the prudence of FIT legislation, but also their overwhelming potential for success in the United States if implemented at the national level. The next step, however, is to move beyond raising awareness to actually enacting FIT legislation. To accomplish this task, it is necessary to scale back the ambitious legislation proposed thus far and, instead, focus on passing more manageable and focused legislation that will not only introduce the nation to FITs, but also serve as a stepping stone to bigger and better FIT legislation in the future.