

2017

Auctions, Taxes, and Air

Dave Owen

UC Hastings College of the Law, owendave@uchastings.edu

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Recommended Citation

Dave Owen, *Auctions, Taxes, and Air*, 65 *UCLA L. Rev. Disc.* 64 (2017).

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Dave Owen



ABSTRACT

In recent California litigation, a group of plaintiffs argued that California's greenhouse gas emissions auction is a form of taxation. California law requires supermajority votes for new taxes, and the emissions auction did not initially receive a supermajority vote, so the argument, if successful, would have rendered unconstitutional a key part of one of the world's most prominent emissions markets. In April 2017, the California Court of Appeals rejected that argument, and the California Legislature later enacted legislation providing the auction system with a supermajority, mooted the question—for now. But similar questions could arise in the future, or in other jurisdictions that choose to auction emissions share.

This article argues that the California courts reached the right result, and that auction charges are not taxes, but for reasons somewhat different from those offered by the California courts. When a government auctions emissions shares, it is selling the right to use a public resource. When governments sell other public resources, like mineral or timber, they usually charge money. When they do not charge or charge too little, the reasons are typically grounded in politics rather than legal constraints. Air should not be different, and emissions auction charges therefore should not be vulnerable to charges that they are a form of taxation.

AUTHOR

Professor of Law, University of California, Hastings College of the Law. I thank Bruce Huber for comments on an earlier draft and the staff of *UCLA Law Review* for their editorial assistance.

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INTRODUCTION

Is auctioning emission shares¹ a form of taxation?² The question might initially seem odd, since environmental economists and lawyers are accustomed to thinking of carbon taxes as an alternative to emissions trading.² The legal argument that an emissions auction is a form of taxation is novel.³

Nevertheless, that novel idea was recently before California's Third District Court of Appeal, which, in a divided decision, declined to treat auction charges as taxes.⁴ Although the California Supreme Court recently denied cert, and the California Legislature mooted the issue for the time being with a supermajority vote extending the program,⁵ future reauthorizations of California's emissions auctions could give rise to similar questions.⁶ Until the 2017 legislation passed, more was at stake than mere semantics. California, like many states, has constitutional provisions requiring supermajorities to enact new or increased taxes. The Global Warming Solutions Act of 2006 (commonly known as AB 32), which authorized California's emissions auctions as part of a sweeping program for regulating greenhouse gas emissions, did not receive a supermajority.⁷ So if emissions auctions were a form of taxation, a key component of the implementation scheme for a landmark statute was—until recently—unconstitutional.

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1. An emissions auction is one component of a cap-and-trade system. Cap-and-trade systems define a fixed cap on emissions of a pollutant, allocate shares of that cap to individual firms or governmental entities, and allow those entities to trade shares. In an auction, firms and governmental entities must bid for shares rather than receive them for free. *See infra* notes 19–39 (describing cap-and-trade systems and auctions in more detail).
 2. *See, e.g.*, Charles Frank, *Pricing Carbon: A Carbon Tax or Cap-and-Trade?*, BROOKINGS: PLANETPOLICY (Aug. 12, 2014), <http://www.brookings.edu/blog/planetpolicy/2014/08/12/pricing-carbon-a-carbon-tax-or-cap-and-trade> [<http://perma.cc/NNP4-GJZP>] (“A carbon tax is one way to put a price on emissions. Cap-and-trade is another.”).
 3. *See infra* notes 63–70 (describing the litigation that first raised this issue). In the political realm, in contrast, labeling any sort of governmental charge a tax is a tried-and-true strategy that many opponents deploy to fight federal climate legislation. *See, e.g.*, “*Cap and Trade*” - *National Energy Tax*, U.S. CONGRESSMAN BILL POSEY, <http://posey.house.gov/issues/issue/?IssueID=5031> [<http://perma.cc/B4XY-WZ4E>].
 4. *Cal. Chamber of Commerce v. State Air Res. Bd.*, 216 Cal. Rptr. 3d 694 (Ct. App. 2017).
 5. *See* Cara Horowitz, *California Extends Its Cap-and-Trade Program Through 2030*, LEGAL PLANET (July 17, 2017), <http://legal-planet.org/2017/07/17/california-extends-its-cap-and-trade-program-through-2030> [<https://perma.cc/7PEU-56LR>].
 6. *See* Andy Coghlan & Danny Cullenward, *State Constitutional Limitations on the Future of California's Carbon Market*, 37 ENERGY L.J. 219, 222 (2016) (noting the need for future reauthorizations).
 7. Global Warming Solutions Act of 2006, Assemb. B. 32, 2006 Leg., Reg. Sess. (codified at CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West 2014)).

Because similar questions could arise elsewhere, the case may have implications extending beyond California. Cap-and-trade schemes are becoming more prevalent, and more jurisdictions are using auctions to allocate at least some of their emissions shares.⁸ If climate law expands, as many people hope it will, both regulatory tools could see greatly increased use. Constitutional restrictions on taxation are also part of the law in many states, and antitax politics are very nearly universal. Additionally, governments are increasingly turning to regulatory fees, which fund regulatory initiatives by charging regulated entities instead of drawing from general tax revenues.⁹ The turn toward fees has raised questions about how to distinguish regulatory fees from taxes.¹⁰ It also raises questions about which side of that divide auction charges fall on or whether they occupy a distinct third category.

This Essay argues for a distinct third category.¹¹ When government auctions emissions shares, it is not imposing taxes or traditional regulatory fees. Instead, government is doing for air what it has often done with other public resources: requiring private users to pay for their use. An emissions auction, in other words, is—as its name suggests—a fundamentally transactional form of regulation, with purchasers securing valuable entitlements to exploit a public resource. An auction therefore is not taxation any more than it is taxation for a state to demand payment when private companies extract timber or oil from public lands. There may be a superficial resemblance because auctions and taxes (and fees, for that matter) create financial incentives, generate government revenue, and then use that combination of incentives and revenue to achieve societal goals.¹² From the perspective of a regulated entity,

8. See *infra* notes 33–36 and accompanying text (describing existing auctions).

9. See *infra* notes 51–52 and accompanying text.

10. See *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350 (Cal. 1997) (holding that a program imposes fees on lead manufacturers and other contributors to lead pollution imposed fees, not taxes, and setting forth the legal standard for drawing such distinctions).

11. There are similarities between the arguments developed here and arguments in an amicus letter submitted by the International Emissions Trading Association (IETA). See Letter from Nicholas W. van Aelstyn, Beveridge & Diamond, P.C., to Hon. Harry E. Hull, Jr., Acting Admin. Presiding Judge of the Third Dist. Court of Appeal, Letter Brief of *Amicus Curiae* for International Emissions Trading Association (May 23, 2016), <https://ieta.wildapricot.org/resources/California/Law%20Suits/2016/IETA%20Amicus/Amicus%20Letter%20Brief%20of%20IETA%20Coalition.pdf> [http://perma.cc/A4MW-3CGG]. Those parallels are not entirely coincidental; I did review the IETA's brief while researching this Essay. I do not, however, represent the IETA or any other party to the proceeding, and I have not communicated with the IETA or its counsel. This Essay offers my own independent view.

12. See Lawrence H. Goulder & Andrew R. Schein, *Carbon Taxes Versus Cap and Trade: A Critical Review*, 4 CLIMATE CHANGE ECON. 1350010 (2013) (explaining similarities and differences between taxes and cap-and-trade systems).

all three options likely feel similar. Legally, however, the differences are significant.

This Essay develops that argument in three parts. Part I explains the roots of the conflict. It describes the emergence of emissions auctions and the growth of antitax constitutional provisions, and then explains how these legal developments collided with AB 32. Part II explains why auctions are better understood as transactions allocating public resources rather than as taxes. That argument, once stated, may seem obvious, and Part III considers why it has only belatedly emerged within the AB 32 debates. The simplest explanation is straightforward: It is easy to conflate a historical practice of allowing private entities to pollute without charge with a legal entitlement to pollute without charge. The public, however, is not legally bound by its own past largesse. If California or some other jurisdiction now wishes to charge users for the ability to pollute public air through emissions auctions, it may do so without treating the charges as taxes.

This argument comes with one important qualification: I do not mean to imply that there is something wrong with pollution taxes. The distinctions among taxes, regulatory fees, and transactional charges do matter, because they each require different modes of legal authorization.¹³ These categorizations also have political implications; few terms are more negatively loaded than “tax.” But while these distinctions are important, many of the policy arguments that support auctioning also extend, at least to some degree, to taxes and fees.¹⁴ California, in other words, would be entirely justified—and justified for some of the same reasons that support its cap-and-trade auctions—if it were to enact a carbon tax. It just has not done so yet.

I. EMERGING AUCTIONS AND TAX REVOLTS

California’s controversy has its roots in two trends that began, entirely unrelated, in the 1970s. One was the emergence of incentive-based regulation as one of the most important ideas in environmental law. The other was an

13. Some commentators have lamented the practical difficulties of drawing these distinctions, arguing they should not hold such importance. *See, e.g.*, David Gamage & Darien Shanske, *On Tax Increase Limitations: Part I – A Costly Incoherence*, ST. TAX NOTES, Dec. 19, 2011, at 813, 816 (“There is no clear line between what is a tax and what is a fee.”). That is a sensible argument, but for now, at least, the California Constitution leaves lawyers and judges with no choice but to draw lines.

14. For a summary of arguments favoring a carbon tax, see SHI-LING HSU, *THE CASE FOR A CARBON TAX: GETTING PAST OUR HANG-UPS TO EFFECTIVE CLIMATE POLICY* (2011).

antitax revolt. This section briefly describes each and then explains how emissions auctions have brought them into collision.

A. Auctions

When Congress and state legislatures drafted the major environmental statutes of the 1970s, legislators were not thinking about trading or auctioning emissions. The 1970s statutes instead placed heavy emphasis on regulatory methods—often pejoratively referred to as “command-and-control”—that specified pollution control standard that would apply uniformly across categories of sources.¹⁵

Economists soon began to criticize those methods and to propose alternatives. They began their critique by noting that different regulated firms often face different costs to achieve similar levels of pollution reduction.¹⁶ If Firm A, with low abatement costs, could reduce pollution levels beyond its regulatory target and could sell a credit based on the excess reductions, while Firm B, with high abatement costs, could purchase the credit and reduce its own emissions a little less, the same environmental outcome could be achieved (assuming the location of the pollution sources didn’t matter) at a lower economic cost.¹⁷ Perhaps, also, the prospect of selling emissions credits would encourage Firm A, or a third party, to accelerate research and development of pollution control technologies.¹⁸ Traditional command-and-control regulation did not allow these benefits, or so the critique went, but perhaps alternative regulatory approaches would.

This appealing insight spawned what environmental lawyers and economists now call cap-and-trade systems.¹⁹ In its simplest form, a cap-and-trade system sets an overall cap on emissions of a pollutant.²⁰ Polluters then receive shares of the cap, and they can buy and sell those shares.²¹ Often the cap

15. See Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era From an Old Idea?*, 18 *ECOLOGY L.Q.* 1, 3 (1991).

16. *Id.* at 6.

17. See *id.* at 8–10.

18. See Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 *COLUM. J. ENVTL. L.* 171, 183 (1988). But see David M. Driesen, *Does Emissions Trading Encourage Innovation?*, 33 *ENVTL. L. REP. NEWS & ANALYSIS* 10094 (2003) (questioning the argument that an emissions trading program will spur research and development into emissions controls, at least for emissions trading schemes that do not use auctions).

19. See Lesley K. McAllister, *Cap-and-Trade*, in *GLOBAL CLIMATE CHANGE AND U.S. LAW* 341 (Michael B. Gerrard & Jody Freeman eds., 2d ed. 2014).

20. *Id.* at 341.

21. *Id.*

will decline over time, but polluters can also sometimes “bank[]” future emissions entitlements by accelerating their reductions and then reserving some credit for future use.²² In practice, cap-and-trade systems are almost always more complicated than this simple sketch might suggest, and designing effective cap-and-trade systems has turned out to be a significant challenge.²³ But many such systems do exist.²⁴ While air quality regulation remains the most prominent application of cap-and-trade concepts, similar systems now populate many subfields of environmental and natural resources law.²⁵

In all of these subfields, cap-and-trade system designers must confront questions about how to initially allocate entitlements.²⁶ One option, which many early cap-and-trade systems used, is to allocate pollution shares on the basis of historic activity.²⁷ For most regulated entities, that is the least disruptive, and therefore the most politically palatable approach (other than no regulation at all).²⁸ But grandfathering creates problems. It rewards the very behavior the cap-and-trade system now seeks to discourage, because if pollution shares are allocated on the basis of historic pollution, the heaviest polluters will receive the largest shares.²⁹ Allocating shares on the basis of historic emissions also places new market entrants at a relative disadvantage; unlike established firms, which receive allocations for free, new entrants will have to pay for their emissions—even if they are much more efficient than their competition.³⁰ Finally, if polluting is a privilege, not an entitlement, then a scheme that allocates

22. See Robert W. Hahn & Gordon L. Hester, *Marketable Permits: Lessons for Theory and Practice*, 16 *ECOLOGICAL Q.* 361, 368 (1989).

23. See Lesley K. McAllister, *The Enforcement Challenge of Cap-and-Trade Regulation*, 40 *ENVTL. L.* 1195, 1196 (2010) (describing the significant informational challenges associated with cap-and-trade programs).

24. See generally MOVING TO MARKETS IN ENVIRONMENTAL REGULATION: LESSONS FROM TWENTY YEARS OF EXPERIENCE (Jody Freeman & Charles D. Kolstad eds., 2007) (describing different uses of incentive-based regulation, including cap-and-trade systems).

25. See Tom Tietenberg, *Tradable Permits in Principle and Practice*, in MOVING TO MARKETS IN ENVIRONMENTAL REGULATION, *supra* note 24, at 63 (describing a variety of applications for cap-and-trade systems).

26. See McAllister, *supra* note 19, at 344–45.

27. *Id.* at 345.

28. See Peter Cramton & Suzi Kerr, *Tradeable Carbon Permit Auctions: How and Why to Auction Not Grandfather*, 30 *ENERGY POL'Y* 333, 343 (2002) (noting that regulated industries generally prefer grandfathering to auctions).

29. See McAllister, *supra* note 19, at 345.

30. See William W. Buzbee, *Clean Air Act Dynamism and Disappointments: Lessons for Climate Legislation to Prompt Innovation and Discourage Inertia*, 32 *WASH. U. J.L. & POL'Y* 33, 38–39 (2010).

emission shares based on historic practices is effectively giving an important privilege away for free.³¹

For these reasons, many environmental economists have advocated auctioning emissions shares.³² Some lawmakers have responded to that call. The architects of the federal sulfur dioxide trading program,³³ the State of Virginia's nitrogen oxide trading program,³⁴ the Regional Greenhouse Gas Initiative,³⁵ and the European Union's greenhouse gas emissions trading system,³⁶ to name some of the examples, have all used auctions. Outside the realm of air pollution control (and the United States' borders), several countries have used auctioning to allocate catch shares for fisheries.³⁷ Many cap-and-trade programs do not auction entitlements, or auction only a subset of entitlements; there is no consensus political view about the appropriate path forward.³⁸ Among economists, however, auctioning emissions now enjoys widespread support.³⁹

Another feature of the debate over cap-and-trade systems also bears mentioning. Taxes often come up in academic debates about cap-and-trade systems, but they are addressed as alternatives to cap-and-trade.⁴⁰ This has

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31. See N. Gregor Mankiw, *Smart Taxes: An Invitation to Join the Pigou Club*, 35 E. ECON. J. 14, 18 (2009) ("Why should an electric utility, for example, be given a valuable resource simply because it has for years polluted the environment? That does not strike me as equitable."). In fact, giving away entitlements will often create an additional windfall, since regulated firms are able to increase charges to consumers while they themselves bear little or no additional cost. See Jacob K. Goeree et al., *An Experimental Study of Auctions Versus Grandfathering to Assign Pollution Permits*, 8 J. EUR. ECON. ASS'N 514, 515 (2010) (describing windfall profits secured by a German company); Markus Wråke et al., *Opportunity Cost for Free Allocations of Emissions Permits: An Experimental Analysis*, 46 ENVTL. & RES. ECON. 331, 332–33 (2010).
 32. See, e.g., Karl Hausker, *The Politics and Economics of Auction Design in the Market for Sulfur Dioxide Pollution*, 11 J. POL'Y ANALYSIS & MGMT. 553, 559 (1992) ("The literature on pollution markets suggests that auctions can help overcome problems of market inefficiency.").
 33. See Robert N. Stavins, *What Can We Learn From the Grand Policy Experiment? Lessons From SO₂ Allowance Trading*, 12 J. ECON. PERSP. 69, 71 (1998).
 34. See David Porter et al., *The Design, Testing and Implementation of Virginia's NO_x Allowance Auction*, 69 J. ECON. BEHAV. & ORG. 190 (2009).
 35. CO₂ Auctions, REGIONAL GREENHOUSE GAS INITIATIVE, http://www.rggi.org/market/co2_auctions [<http://perma.cc/FVX8-XRMS>].
 36. See *Auctioning*, EUR. COMMISSION (July 27, 2017), http://ec.europa.eu/clima/policies/ets/auctioning_en [<http://perma.cc/9D4V-VART>] ("Auctioning is the default method of allocating allowances within the EU emissions trading system . . .").
 37. See, e.g., John Lynham, *How Have Catch Shares Been Allocated?*, 44 MARINE POL'Y 42, 43 (2014).
 38. See Cramton & Kerr, *supra* note 28, at 343 (lamenting regulated industries' opposition to auctions, which are often politically successful).
 39. See, e.g., Lynham, *supra* note 37, at 43 ("Most economists would advocate that the best method for allocating a publicly held resource to private individuals is through an auction.").
 40. See, e.g., Goulder & Schein, *supra* note 12, at 1350010–2 (noting "much debate" about whether a cap-and-trade or a tax-based system is superior).

been particularly true for climate change.⁴¹ Many economists and lawyers have argued that a carbon tax is the optimal policy response to climate change, and hundreds of pages of articles and books have debated the relative merits of cap-and-trade systems and taxes.⁴² Participants in those debates often note that both systems share similarities; both are regulatory instruments that, at their core, function as mechanisms for placing prices on carbon and using those prices to drive down emissions.⁴³ The cap-and-trade versus tax debates would never have been so extensive, however, if economic and legal experts believed that cap-and-trade systems and taxes really were the same thing. That proposition, instead, would come from litigants.

B. Tax and Fee Limitations

While economists began contemplating the possibility of incentive-based regulation for carbon emissions, the citizens of California were revolting against taxes.⁴⁴ In 1978, in response to a widespread perception that local property taxes were excessively high and rising too fast, Californian voters enacted Proposition 13, which established limitations on local tax rates and tax hikes.⁴⁵ In the years since, other initiatives have followed, each designed to restrict the ability of state and local governments to raise revenue.⁴⁶ Consequently, California taxes can be raised, if at all, only by legislative supermajorities.⁴⁷ And while California was a pioneer in the antitax revolts, it was not alone.⁴⁸ States across the country have constitutionalized similar restrictions.⁴⁹

Though Californians restricted state and local taxation, they did not revise their expectations for government services, and that placed state and local

41. See, e.g., *id.*

42. See, e.g., Nathaniel O. Keohane, *Cap and Trade, Rehabilitated: Using Tradable Permits to Control U.S. Greenhouse Gases*, 3 REV. ENVTL. ECON. & POL'Y 42 (2009) (advocating cap-and-trade systems); William D. Nordhaus, *To Tax or Not to Tax: Alternative Approaches to Slowing Global Warming*, 1 REV. ENVTL. ECON. & POL'Y 26 (2007) (advocating taxes).

43. See Goulder & Schein, *supra* note 12, at 1350010–2.

44. See generally ARTHUR O'SULLIVAN ET AL., PROPERTY TAXES AND TAX REVOLTS: THE LEGACY OF PROPOSITION 13 (1995) (describing Proposition 13's history and aftereffects).

45. CAL. CONST. art. 13A; see *Nordlinger v. Hahn*, 505 U.S. 1, 4–5 (1992).

46. See *Schmeer v. County of Los Angeles*, 153 Cal. Rptr. 3d 352, 356–64 (Ct. App. 2013) (describing Propositions 13, 218, and 26).

47. See *id.* at 357, 359, 361 (noting requirements for two-thirds majorities).

48. See Clyde Haberman, *The California Ballot Measure That Inspired a Tax Revolt*, N.Y. TIMES (Oct. 16, 2016), http://www.nytimes.com/2016/10/17/us/the-california-ballot-measure-that-inspired-a-tax-revolt.html?_r=0.

49. See Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 866 (2012) (“Over thirty states have some combination of constitutional or statutory tax and expenditure limitations . . .”).

governments in a quandary.⁵⁰ Government still had to be funded somehow, and one possible response was to turn from taxes to fees. Beyond generating revenue, fees have policy arguments in their favor. Most importantly, fee programs can assign the burdens of funding government in at least rough proportion to the public burdens created by fee-payers' activities. Consequently, governments charged the public for many services that once would have been funded from general tax revenues, which, in turn, sparked further backlash and subsequent constitutional amendments.⁵¹ Neither the California Legislature nor the voters has eliminated the use of regulatory fees as a potential funding mechanism, but local governments' ability to impose fees is now quite constrained.⁵²

One consequence of the limitations on taxing authority and the resulting turn to fees has been to make the distinction between fees and taxes very important.⁵³ If state or local governments could label any revenue instrument as a regulatory fee, even if that instrument is designed solely to support the general fund, they might circumvent the constitutional limits created by Proposition 13 and its progeny. Conversely, if courts were to define the tax category with excessive breadth, a valuable and often fair method of funding government services would be difficult to use, if not entirely lost.

Many California cases have wrestled with this distinction. Most prominent among them is *Sinclair Paint Co. v. State Board of Equalization*,⁵⁴ which upheld fees imposed under the Childhood Lead Poisoning Prevention Act and established a three-part standard for distinguishing fees from taxes.⁵⁵ But *Sinclair Paint* is just the tip of a growing iceberg,⁵⁶ and perhaps the most important recent dispute involves emissions auctions.

50. See O'SULLIVAN ET AL., *supra* note 44, at 3 (citing Jack Citrin, *Do People Want Something for Nothing? Public Opinion on Taxes and Government Spending*, 32 NAT'L TAXJ. 113 (1979)).

51. See *Schmeer*, 153 Cal. Rptr. 3d at 359–64 (describing Proposition 218, from 1992, and Proposition 26, from 2010).

52. See *Pajaro Valley Water Mgmt. Agency v. Amrhein*, 59 Cal. Rptr. 3d 484, 491–92 (Ct. App. 2007) (describing requirements created by Proposition 218, which expanded the definition of tax to encompass some charges previously categorized as fees).

53. See *Gamage & Shanske*, *supra* note 13, at 816 (“Making the fee-tax question so important puts enormous pressure on tax-fee jurisprudence.”). California’s 2010 constitutional amendment, which expands the definition of taxes to include some fees, will reduce the importance of that distinction to some degree and shift the battlegrounds, but it does not eliminate the issue, particularly for fees enacted pursuant to pre-2010 statutes. See *Coghlan & Cullenward*, *supra* note 6, at 221.

54. 937 P.2d 1350 (1997).

55. *Id.*

56. See, e.g., *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 247 P.3d 112 (Cal. 2011); *S. Cal. Edison Co. v. Pub. Utilities Comm'n*, 173 Cal. Rptr. 3d 120, 139–45 (Ct. App. 2014);

C. AB 32 and the Colliding Trends

In 2006, the California Legislature enacted AB 32, a landmark statute addressing California's contributions to climate change.⁵⁷ The statute empowers the California Air Resources Control Board (CARB) to utilize a wide variety of regulatory techniques, including "market-based compliance mechanisms."⁵⁸ The Legislature did not specifically demand a cap-and-trade system, but that language about market-based regulation authorized CARB to implement a cap-and-trade system if it chose to do so, and CARB did indeed adopt a cap-and-trade program as part of a larger portfolio of regulatory measures.⁵⁹ CARB allocated many of the emissions shares on the basis of historic emissions levels, but it reserved a subset of the shares—approximately 25 percent—to be auctioned.⁶⁰

AB 32 provoked vigorous—though, to date, ineffective—opposition. After failing to stop the bill, some of its opponents turned directly to the voters. They sponsored a measure that would have stayed implementation of AB 32 until the state's unemployment rate dropped to 5.5 percent and stayed at that level for a full year.⁶¹ In 2010, however, the California voters overwhelmingly rejected the measure.⁶²

Opponents then turned to the courts. Rather than taking on the entire program, a group of regulated industries and their representative associations zeroed in on the auction.⁶³ Their arguments, distilled down, employ a simple syllogism:

1. Under California law, a scheme that produces revenue is either a regulatory fee or a tax.
2. California law defines specific criteria for determining when a revenue-producing measure qualifies as a regulatory fee.

Griffith v. City of Santa Cruz, 143 Cal. Rptr. 3d 895, 904–06 (Ct. App. 2012); Equilon Enters. v. State Bd. of Equalization, 117 Cal. Rptr. 3d 223 (Ct. App. 2010). This is a just a small sampling.

57. Global Warming Solutions Act of 2006, Assemb. B. 32, 2006 Leg., Reg. Sess. (codified at CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West 2014)).

58. *Id.* §§ 38562(c), 38570(a).

59. CAL. CODE REGS. tit. 17, §§ 95801–96022 (2016).

60. *Id.* § 95910.

61. See Eric Biber, *Cultivating a Green Political Landscape: Lessons for Climate Change Policy From the Defeat of California's Proposition 23*, 66 VAND. L. REV. 399, 403 (2013).

62. See generally *id.* (describing Proposition 23 and explaining why it was defeated).

63. See *Cal. Chamber of Commerce v. State Air Res. Bd.*, 216 Cal. Rptr. 3d 694 (Ct. App. 2017). The plaintiffs and plaintiff-interveners are the California Chamber of Commerce, Morningstar Packing Company, and the National Association of Manufacturers. The Pacific Legal Foundation, a firm that pursues impact litigation against environmental and natural resource regulation, represents Morningstar Packing Company.

3. The emissions auction scheme does not meet those specific criteria.
4. Therefore, the emissions auction scheme is a tax.⁶⁴

Had they succeeded with their argument, it would have spelled the end of emissions auctions in California.⁶⁵ The argument also could inspire copycat litigation in other jurisdictions, or even deter other jurisdictions from trying to set up auction systems. Without auctions, more of the financial cost of emissions regulation—to the extent that it occurs—would fall upon the public.

In November 2013, a California Superior Court judge in Sacramento County rejected the plaintiffs' arguments, concluding that the auction charges enacted pursuant to AB 32 were permissible as regulatory fees.⁶⁶ The plaintiffs appealed to California's Third District Court of Appeal, and on April 6, 2017, a divided panel affirmed the trial court.⁶⁷ The court began by rejecting, unanimously, the plaintiffs' argument that AB 32 did not actually authorize the auction. Then it turned to the constitutional question. On that issue, the court was divided. Two justices agreed that the auction charges were not taxes. As the court explained:

First, the purchase of emissions allowances, whether directly from the Board at auction or on the secondary market, is a business-driven decision, not a governmentally compelled decision; second, unlike any other tax to which we have been referred by the parties, the purchase of an emissions allowance conveys a valuable property interest—the privilege to pollute California's air—that may be freely sold or traded on the secondary market.⁶⁸

Justice Harry E. Hull dissented. In his view, participation in the market was not really voluntary (at least on the facts before the court); the conveyed interest was not really property;⁶⁹ and the use of the auction revenues was

64. See California Chamber of Commerce et al. Appellants' Opening Brief at 36–50, *Cal. Chamber of Commerce*, 216 Cal. Rptr. 3d 694 (No. C075954), 2014 WL 5462660, at *36–50.

65. The California Legislature has since mooted the issue, at least until 2030, by authorizing the auction through a supermajority vote. See Horowitz, *supra* note 5 (noting the passage of AB 398, Assemb. B. 398, 2017 Legis., Reg. Sess. (2017)).

66. Joint Ruling on Submitted Matters, *Cal. Chamber of Commerce v. Cal. Air Res. Bd.*, No. 34-2012-80001313, (Cal. Super. Ct. Nov. 12, 2013), *Morning Star Packing Co. v. Cal. Air Res. Bd.*, No. 34-2013-80001464, (Cal. Super. Ct. Apr. 16, 2013).

67. *Cal. Chamber of Commerce*, 216 Cal. Rptr. 3d 694.

68. *Id.* at 716.

69. See *id.* at 730 (Hull, J., dissenting). The justices' fixation on whether emissions entitlements could be labeled "property" is puzzling because it seems to imply, for reasons that are not at all clear, that a transaction would be a tax—even if it conveyed a valuable interest from government to a third party—if that conveyed interest could not be labeled property. But this peculiarity of the court's reasoning is not the focus of this Essay.

indistinguishable from uses of tax revenues. For all of these reasons, he concluded that the auction charges really were taxes, and thus were unconstitutional.⁷⁰

On June 28, 2017, the California Supreme Court denied the plaintiffs' cert petition, bringing this round of the controversy to a close.

II. "OUR AIR"

One striking feature of the Third District's decision is its length, and the extent to which both the appellate and trial court seem to have viewed *California Chamber of Commerce v. State Air Resources Board*⁷¹ as a difficult case. If the facts had involved the state auctioning entitlements to take timber off state lands, the case likely would not strike most observers as difficult. Indeed, it probably never would have been filed. There is rarely any legal question about the government's ability to charge market prices for land or associated public interests, and no one would characterize a transaction based on fair market value as a tax. Instead, the primary legal issues that arise when the government sells land or other related property interests are whether the sale is even authorized and, if it is, whether the selling price is too low.⁷² A variety of legal doctrines, including the public trust doctrine, prohibitions on gifts of public property, and various statutory constraints, exist at least partly to ensure that government does not give the public's resources away too cheaply.⁷³

The central question raised by *California Chamber of Commerce*—and a question that none of the court opinions so far has explored in any depth—is whether air is different. The short answer is that it is not. While every natural resource has its own distinctive physical nature, and the body of legal authority defining public rights in air is not nearly as extensive as the comparable bodies of law for other resources, legal authority clearly establishes that air is a public

70. *Id.* at 730–44.

71. 216 Cal. Rptr. 3d 694.

72. See generally Bruce R. Huber, *The Fair Market Value of Public Resources*, 103 CALIF. L. REV. 1515 (2015) (describing the federal government's tendency to alienate public resources at discounted prices, or even for free).

73. See, e.g., 43 U.S.C. § 1701(a)(9) (2012) ("The Congress declares that it is the policy of the United States that . . . the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute."); CAL. CONST., art. XVI, § 6 (prohibiting gifts of public property); *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."); *Alameda County v. Janssen*, 106 P.2d 11, 14 (1940) (discussing California's constitutional prohibition on gifts of public property).

resource. Judicial decisions that consider public rights in air agree that those rights do exist, and private air rights, though real, are spatially limited and do not convey a right to pollute.⁷⁴ Common sense and basic property law principles also bolster the legal conclusion that air is public, and that private entitlements to pollute public air, while allowable, need not be given free of charge.

Precedent governing the public nature of air emerges from two primary bodies of case law, one considering rights to air as space and the other considering air pollution. The former set of cases consistently affirms that estates in land carry some ability to use the space immediately above that land, but they reject arguments that private air rights extend more than a short distance above the ground. As the U.S. Court of Appeals for the Federal Circuit has noted: “[I]t is well established under federal law that the navigable airspace is public property not subject to private ownership.”⁷⁵ In *United States v. Causby*,⁷⁶ the U.S. Supreme Court put the same point even more bluntly: “The air is a public highway,” the Court stated, and to honor countervailing private rights would “transfer into private ownership that to which only the public has a just claim.”⁷⁷ The *Causby* Court did note that private land rights include some air space.⁷⁸ A private property owner’s right to exploit airspace, however, extends only a short vertical distance and laterally no further than the boundaries of her parcel, unless a landowner negotiates an easement with her neighbor.⁷⁹

Air pollution cases similarly emphasize the public and governmental interest in air. The most famous of these cases is *Georgia v. Tennessee Copper Co.*,⁸⁰ in which Justice Holmes proclaimed that the state, as “quasi-sovereign” has “an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”⁸¹ Holmes’s statement, like much of his classic prose, mixes ambiguity with elegance; he did not elaborate in any great detail about the nature of the public

74. See *infra* notes 75–85 and accompanying text.

75. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1217 (Fed. Cir. 2005) (citing 49 U.S.C. § 40103(a)(2) (2000)).

76. 328 U.S. 256, 261 (1946).

77. *Id.* at 261.

78. *Id.* at 264 (“[I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere.”).

79. See *Taliaferro v. Salyer*, 328 P.2d 799, 801 (Cal. Ct. App. 1958) (“It is well settled in California that easements for light and air cannot be created by implication but only by express grant or covenant.”).

80. 206 U.S. 230 (1907).

81. *Id.* at 237.

interests he recognized.⁸² But nowhere in this case, or elsewhere in the Court's jurisprudence, does the Court advance the idea that the state's interest in its people's air must be balanced against a countervailing private ownership interest in the atmosphere.⁸³ Nor is it part of the law of California. Instead, California courts have repeatedly stressed that air pollution, while sometimes legal, does not occur under any claim of right.⁸⁴

Interestingly, these cases are not the tip of an iceberg of jurisprudence. Cases in which courts have held forth on public rights in air are rare, particularly in comparison to the enormous bodies of jurisprudence considering public rights in water, wildlife, or land.⁸⁵ Statutory references to public or private rights in air are also not abundant. To the extent these legal sources do exist, they agree unanimously that air is public.⁸⁶ In contrast to the law of land or water, there is no body of jurisprudence defining the atmosphere as a private resource.⁸⁷

The practical difficulties associated with any other regime reinforce the legal reality that air is public. As legal commentators since Justinian and Blackstone have noted, air is the ultimate commons.⁸⁸ We can do very little to

82. *See id.*

83. The Court's takings jurisprudence, in contrast, does recognize the need to balance public regulatory authority with spatially limited private property rights to airspace. *See, e.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (denying a takings claim based on regulations that limited Penn Central's ability to build into its air space).

84. *See, e.g.*, *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.*, 106 Cal. Rptr. 3d 502, 514 (Ct. App. 2010) (declining to find any vested pollution right, and citing other decisions agreeing with that principle).

85. *See generally* JAMES RASBAND ET AL., *NATURAL RESOURCES LAW AND POLICY* (3d ed. 2016) (devoting over a thousand pages to natural resource law, with many of those pages addressing tensions between public and private rights).

86. *See, e.g.*, 42 U.S.C. § 9601 (2012) ("The term 'natural resources' means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government . . ."); MICH. COMP. LAWS ANN. § 324.1703 (West 2007) (referring to "the air, water, or other natural resources or the public trust in these resources") *see also* S. REP. NO. 91-1196, at 4 (1970) (noting, in a report on the then-proposed Clean Air Act, that "air is a public resource").

87. *Cf., e.g.*, *Eddy v. Simpson*, 3 Cal. 249, 252 (1853) (recognizing private usufructuary rights in water).

88. *See* *Geer v. Connecticut*, 161 U.S. 519, 526 (1896) ("[T]here are some few things which . . . must still unavoidably remain in common . . . Such (among others) are the elements of light, air and water" (quoting 2 WILLIAM BLACKSTONE, *COMMENTARIES* *14)), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Zack's, Inc. v. City of Sausalito*, 81 Cal. Rptr. 3d 797, 805 n.5 (Ct. App. 2008) ("Book II, title I, sections 1 through 5 of the Institutes of Justinian declare that: '1. Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea" (quoting 2 THOMAS COOPER, *THE INSTITUTES OF JUSTINIAN*, at tit. I §§ 1-5 (3d ed. 1852))).

constrain its movement, and it therefore must be shared. Nor can pollution, once emitted, be controlled; the pollution we release follows paths chosen largely by wind and rain, not human intervention, and we can neither retract the pollution we release nor avoid the pollution coming from our neighbors. It is ours to share whether we like it or not. The classic indicia of private property ownership—the abilities to establish discrete rights, to exclude others from use, and to transfer interests—are all missing.⁸⁹ Not coincidentally, our legal systems affirm public rights in other resources, like wildlife and water, that are considerably less difficult for private individuals to control.⁹⁰ The same reasoning that supports those public rights extends with even greater force to air.

These arguments do raise one thorny question: If air is public, which public does it belong to? Is the rightful public owner a local government, a state, or the nation, or is air exclusively the common heritage of humanity, to which no state or nation can lay a proprietary claim? One recent article makes such a claim, asserting that the global nature of greenhouse gases and climate change precludes any state from asserting a property interest in air.⁹¹ But there is a logical leap involved in concluding that the air within a state cannot be state property just because that air is affected by a global-scale problem, or because air itself is globally mixed. By analogy, water is also affected by global problems, including climate change, and the water cycle is global in its scale, yet that has not stopped property law from recognizing state interests in physical water within the state.⁹² Nor, in the past, has the transboundary nature of air pollution stopped the U.S. Supreme Court from recognizing a state's interest "in all the . . . air within its domain."⁹³ Perhaps that interest is shared with the interests of publics at larger geographic scales, but that does not mean the state's interest does not exist.

89. See Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 970 (1985) (asserting that "the right of alienation is a normal incident of private ownership."); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (noting this "air in the upper atmosphere" is not conducive to private exclusion).

90. See, e.g., *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983) (explaining public trust interests in water); *Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588, 597 (Ct. App. 2008) ("[I]t has long been recognized that wildlife are protected by the public trust doctrine.").

91. Coghlan & Cullenward, *supra* note 6, at 248 (arguing that the notion of a state having a property right in air is "inconsistent with atmospheric physics"). While I think Coghlan and Cullenward are wrong on this point, I also think their article is generally excellent.

92. See CAL. WATER CODE § 1201 (West 2009) ("All water flowing in any natural channel . . . is hereby declared to be public water of the State . . .").

93. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

In short, a combination of precedent, principle, and common sense establishes that the air must be a public resource. As one commentator explained, “normal legal reasoning supports claims that the atmosphere lies within the public trust; the absence of precedent on this point is a testament to the prior lack of need to specify the nature of ownership of atmosphere.”⁹⁴ To put the same point more colloquially, existing law and common sense both follow the same obvious intuition that leads us to refer to the molecules and space above us not as “mine,” but as “our air.”⁹⁵

Because air is public, the state, as the public’s representative, has every right to demand compensation when it allows that air to be polluted for private gain. We would not think twice if California chose to auction easements to harvest timber on, or drill natural gas beneath, state lands.⁹⁶ So long as the public owns the resources at stake, and so long as it adopts auction charges through appropriate legal processes, those charges would strike most viewers as garden-variety good governance. Indeed, to do anything other than charge market rates (or not sell the resources at all) would be the legally questionable course. The atmosphere should be no different. The state, acting on behalf of the public, is well within its rights charging fair-market-value fees to entities that would dispose their wastes in the public’s air.

III. AIR AUCTIONS AND RESOURCE POLITICS

If California’s emissions auction involves the state conveying privileges to use public resources in return for market-rate fees, that raises a few interesting subsidiary questions. First, why did the state not do this sooner? After all, air pollution is not a new phenomenon, yet before AB 32, California had never auctioned off air pollution entitlements. One might also ask whether the that history of non-use reflects some legal limitation on the use of auctions. Second, if air is indeed a public resource, what are the secondary implications of that status? Does classification as a public resource lead to additional—and perhaps undesirable—obligations for the state?

This last part considers these two questions. The response to the first, in brief, is that while governments often take a long time to begin securing fair

94. J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915, 926 (2012).

95. See, e.g., *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 8 (D.C. Cir. 1976) (“[L]ead particulate emissions from gasoline engines account for approximately 90 percent of the lead in *our air*.” (emphasis added)).

96. Or, at least, we would not question the state’s ability to seek those charges. There might be questions about whether the state could or should auction off its resources at all.

market value for public resources, if they ever do so at all, the reasons for that delay are typically political and practical, not legal.⁹⁷ The slow move toward auctioning air pollution rights therefore reflects a familiar and often-repeated political story, not some legal infirmity with auctions. In answer to the second question, the secondary implications of recognizing air's status as a public resource should not be troubling. Such status obligates the state to steward the public's resources with care, but that obligation is nothing threatening or new.

A. The Difficult Transition Away From Open Access

In the late nineteenth century, in a legal shift with parallels in the present day, the U.S. government began to restrict resource access in the American West.⁹⁸ For many years, pioneers had been able to acquire natural resources rather cheaply, if not for free.⁹⁹ Timber harvesters stripped the upper Midwest and then western forests, often paying nothing even though they operated on public lands.¹⁰⁰ Livestock ranged across the public domain, and shepherds and cattlemen initially paid no compensation to the domain's owners.¹⁰¹ Miners extracted gold and other minerals without paying royalties, and they used huge volumes of water, all of which they diverted from public waterways without paying the public a dime.¹⁰² While some resource users paid to obtain title to the lands they exploited (others just took the resources without seeking title to the lands), the prices were extremely low, and the flat per-acre rates did not factor in the value of the resources the new landowners hoped to

97. See generally Huber, *supra* note 72 (explaining the political challenges associated with securing fair market value for public resources).

98. For general discussion of this transition, see CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE AMERICAN WEST* (1992).

99. See Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 *GEO. L.J.* 991, 1023–33 (2014).

100. See WILKINSON, *supra* note 98, at 120–22; Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases That Changed the American Landscape*, 70 *TUL. L. REV.* 2279, 2292–94 (1996).

101. As one court described:

All the neighbors who had settled near one of these prairies or on it, and all the people who had cattle that they wished to graze upon the public lands, permitted them to run at large over the whole region, fattening upon the public lands of the United States and upon the uninclosed lands of the private individual without let or hindrance.

Buford v. Houtz, 133 U.S. 320, 327 (1890).

102. See Huber, *supra* note 72, at 1534; WILKINSON, *supra* note 98, at 241–42 (noting that western water users took their water for free).

extract.¹⁰³ The result was a historical period often referred to as “The Great Barbecue,” when massive quantities of public resources shifted to private hands, with millions of acres of damaged landscapes left behind.¹⁰⁴ In modern terms, it was a classic “tragedy of the commons.”¹⁰⁵

Nineteenth-century policymakers had their reasons for endorsing that barbecue. Many wanted to encourage western expansion and economic growth; some stood to personally benefit; and some realized that federal and state governments, with their limited resources, would struggle to enforce stricter controls.¹⁰⁶ Many natural resources also initially seemed inexhaustible, and the notion that we might run out struck observers as bizarre.¹⁰⁷ But the regime could not, and did not, last. The federal government reserved timberlands, restricted cutting levels, and began to auction off timber harvesting contracts through competitive bids.¹⁰⁸ Competitive bidding processes were introduced to manage coal, oil, and natural gas extraction.¹⁰⁹ Concerned about massive overgrazing, the federal government first restricted grazing rights and then instituted a system of grazing fees.¹¹⁰

These shifts did not happen smoothly. Resource users, many of whom had become accustomed to and deeply invested in free access, often vigorously opposed the changes.¹¹¹ Indeed, that opposition continues to the present day, and is often effective.¹¹² Entrenched, focused, and moneyed interests tend to fare

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103. See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 79 (1956) (“Throughout most of the [nineteenth] century the national and state governments sold their land with no adequate regard to the special resources in soils, minerals, or timber which might make particular tracts of extraordinary value.”).
 104. See SARA DANT, *LOSING EDEN: AN ENVIRONMENTAL HISTORY OF THE AMERICAN WEST* 65–80 (2017).
 105. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968) (arguing that management of shared resources is doomed to tragedy unless regulation intervenes).
 106. See DANT, *supra* note 104, at 65–80.
 107. See, e.g., Shannon Carroll, Comment, *Sector Allocation: A Misguided Solution*, 17 *OCEAN & COASTAL L.J.* 163, 167 (2011) (describing the tragically misguided perception that fisheries were inexhaustible).
 108. See Susan Athey & Jonathan Levin, *Information and Competition in U.S. Forest Service Timber Auctions*, 109 *J. POL. ECON.* 375, 376 (2001) (describing the United States Forest Service’s bidding process).
 109. See Kenneth Hendricks & Robert H. Porter, *Auctioning Resource Rights*, 6 *ANN. REV. RESOURCE ECON.* 175 (2014) (describing oil and gas leasing); Huber, *supra* note 72, at 1522–28 (describing, and critiquing, federal coal leasing).
 110. See RASBAND ET AL., *supra* note 85, at 1042–46.
 111. See, e.g., *id.* at 1083 (noting opposition to grazing fees); WALLACE STEGNER, *WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS* 64–67 (1992) (critiquing western opposition to resource regulation).
 112. See, e.g., Mark Jaffe, *What Does a Trump Administration Mean for Western Public Lands?*, *DENVER POST* (Jan. 23, 2017, 3:38 PM), <http://www.denverpost.com/2016/11/26/the-really-real-world->

quite well in political battles, and the history of western resource use provides a litany of examples of that reality.¹¹³ Consequently, across much of the West, governmental resources continue to flow into private hands at prices well below market rates.¹¹⁴ But while shifting to paid access can be politically difficult, past governmental policies of free, or nearly free, giveaways provided no legal guarantee of future open access. Instead, as the U.S. Supreme Court once explained, the federal government's "failure to object . . . did not confer any vested right on [resource users], nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes."¹¹⁵

California's air pollution policies are just the latest episode in this history—they repeat, for air, a set of trends that played out earlier for many other public resources. The substance of the shift is similar, as were its stages. Much as the federal and state governments did with land, minerals, grass, and timber, California began with a policy of open access, in which air pollution could be emitted largely without restraint. It then moved to a policy of limited but still free access, with regulatory controls but no charges. Most recently, the state shifted to its current policy of regulatory controls and partial charges. The reasons for California's evolving approach to air pollution also closely resemble the motivations for earlier efforts to protect public resources. California realized that the use of a public resource was harming the public, and while the state could still allow some harmful use, there is no reason why the state should allow it for free.¹¹⁶ The opposition, as evidenced by the current litigation, pursued similar strategies as well. But most importantly, the same basic legal principle should govern the controversy about the shift to emissions auctions. The fact that California for generations gave away, for free, the right to pollute its air does not convert its present auction charges into taxes. Instead, those charges are a familiar (and rather restrained) transition away from an era of free access.

could-temper-a-trump-interior [<http://perma.cc/CRX8-4UR8>] (describing the Trump Administration's interest in a resurgence of resource extraction); *cf.* William Chaloupka, *The County Supremacy and Militia Movements: Federalism as an Issue on the Radical Right*, 26 *PUBLIUS* 161 (1996) (describing resistance to federal governance).

113. *See generally* MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965) (arguing that small, coordinated groups with strong interests have political advantages over larger groups with more diffuse interests).

114. *See generally* Huber, *supra* note 72 (summarizing this history).

115. *Light v. United States*, 220 U.S. 523, 535 (1911).

116. *See* CAL. HEALTH & SAFETY CODE § 38501 (West 2014) (describing the risks and harms associated with climate change).

Beyond establishing that the move from free access to charges is nothing new, this brief history of public resource use underscores another important point. It would be sadly ironic if, after California finally took an important step toward respecting the public right in a vital natural resource, the courts undermined the auction program by reclassifying its charges as taxes. The politics of public resource management are hard enough without additional and artificial legal hurdles.

B. Stopping Points?

Suppose a court were to acknowledge that emissions auctions are transactions, not taxes. This raises one last question: What other obligations would flow from that legal recognition, and are they problematic? A lawyer representing the state or regulated entities might initially have concerns. In a set of cases referred to as “atmospheric trust litigation,”¹¹⁷ environmental plaintiffs are currently pressing the claim that the atmosphere is a public trust resource—not just a public resource—and that its status as a public trust resource obligates state courts to order major reductions in greenhouse gas emissions.¹¹⁸ For states, that litigation might raise fears of collateral consequences: will acknowledging that air is a public resource lead inexorably to exacting judicial oversight of its management?¹¹⁹

The answer is no; the fears would be largely ungrounded. Even if a court were to hold that the atmosphere is indeed a public trust resource, that outcome would neither remove states’ discretion to manage their air in sensible ways, nor transfer oversight from legislatures and agencies to the courts.¹²⁰ California’s experience managing other public trust resources illustrates why. For

117. Mary Christina Wood, *Atmospheric Trust Litigation Across the World*, in FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST 99 (Ken Coghill et al. eds., 2012).

118. See, e.g., *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (rejecting motions to dismiss an atmospheric trust claim).

119. See, e.g., Mary Christina Wood, *Atmospheric Trust Litigation*, in CLIMATE CHANGE: A READER (W.H. Rodgers Jr. et al. eds., 2011) (describing a strategy in which judicial intervention would displace agency discretion).

120. In my view, the atmospheric trust litigants offer powerful policy and common sense-based arguments in favor of treating air as a public trust resource, but their doctrinal arguments are weak. While there are compelling arguments that the public trust doctrine should extend to air, and to many other public resources, there is little judicial authority directly supporting that move. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556–57 (1970). Of course, even if air is not a public trust resource, it still should be managed in ways that serve public interests. See *supra* note 73 (citing other legal doctrines supporting the general principle that public resources should be managed for public benefit).

decades, California has managed its navigable waterways and their tributaries as public trust resources.¹²¹ That status has affected state management of water resources, primarily by giving state agencies an additional basis for protecting public interests in waterways and a reminder of the importance of that protection, but it has not led to a loss of administrative flexibility or a judiciary run amok.¹²² Instead, in a 2012 study of California public trust litigation and administrative decision-making, I found that no evidence of public trust claims leading to anything that might be described as judicial activism.¹²³ Similar outcomes are likely for air. Recognizing its public character will empower government managers to protect the atmosphere, but that recognition will not snare managers in webs of hyper-legalized constraint.

CONCLUSION

The future of California's emissions auctions is still uncertain. Revenues have fluctuated wildly.¹²⁴ Although carbon emissions are declining, the role of the emissions auction, and the cap-and-trade program more generally, in driving those reductions is difficult to separate from the role of AB 32's other measures.¹²⁵ Despite these issues, the 2017 passage, with a supermajority vote, of legislation authorizing the auction affirms that the auction will probably remain a key part of California's system of greenhouse gas regulation for years to come.¹²⁶ But it is also possible that California will turn to some other regulatory method.¹²⁷ But whatever course the people of California—or some other

121. See Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665 (2012) (summarizing the history of California's public trust doctrine).

122. See Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1104 (2012) ("In the post-1983 California freshwater cases available on Lexis and Westlaw, no court has cited the public trust doctrine as a reason for ordering anyone to do anything.").

123. *Id.* at 1151.

124. Interestingly, some evidence suggests those fluctuations are partly due to litigation uncertainty. See, e.g., Dale Kasler, *California Climate Program Has Struggled. Why the Billion-Dollar Rebound?*, SACRAMENTO BEE (May 24, 2017, 12:47 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article152407344.html> [<http://perma.cc/7BCN-LE8K>].

125. Compare Michael Hiltzik, *California's Cap-and-Trade Program Has Cut Pollution. So Why Do Critics Keep Calling It a Failure?*, L.A. TIMES (July 29, 2016, 12:55 PM), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-captrade-20160728-snap-story.html> [<http://perma.cc/DM5B-YYHW>] (crediting the cap-and-trade program for causing emissions reductions), with Coghlan & Cullenward, *supra* note 6, at 236 (arguing that other regulatory measures and a shift of high-carbon energy away from California account for most of the apparent emissions reductions).

126. See *supra* note 5 and accompanying text.

127. See Coghlan & Cullenward, *supra* note 6 (describing uncertainties in future greenhouse gas regulation and potential policy responses).

jurisdiction—choose, they have every right to charge for entitlements to pollute public air. That prerogative should not disappear because courts classify resource use charges as taxation.