



# This land is your land, maybe: A historical institutionalist analysis for contextualizing split estate conflicts in U.S. unconventional oil and gas development



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## ABSTRACT

In the 21st century, the U.S. has experienced a boom in unconventional oil and gas development (UOGD). In part due to advances in technology, this rapid increase in UOGD has moved extraction practices into geographic areas that have previously seen little or no oil and gas development. As a result, conflicts over property rights have erupted—particularly in relation to split estate situations. To understand this controversy, we must situate it in the conditions which have shaped land use and mineral rights. We argue that past federal and state level governance decisions have created the conditions for UOGD conflicts today. Here, we utilize historical institutionalism (HI) to review the historical actors, processes, and institutions that have shaped how mineral rights have developed in the context of split estates in the U.S. We suggest that tracing this legislative and judicial history through HI is an essential foundation for exploring issues related to UOGD. Most importantly, we highlight these processes of governance as a bedrock for understanding spatial inequality inherent in current split estate law that grants the mineral estate dominance over the surface estate. We suggest that this codification of spatial inequality is problematic both in and beyond the context of split estates in UOGD.

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## 1. Introduction

In the 21st century, the U.S. has experienced a boom in unconventional oil and gas development (UOGD). Due in part to technological advances and the locations of shale gas deposits, unconventional extraction practices are taking place in geographic areas that have previously seen little or no previous oil and gas development (Goho, 2012). The rapid rise in UOGD production and the expansion of spaces of extraction has acted as an economic boon for the U.S. (Australian Government, Department of the Environment, 2014), but has also led to intense controversy and concern over impacts to the environment and human health and well-being in communities experiencing UOGD (i.e. see Adgate et al., 2014; Entrekin et al., 2011; Finkel, 2015; Fry et al., 2012; Gregory et al., 2011; Howarth et al., 2011; Jacquet, 2014; McKenzie et al., 2012; McKenzie et al., 2014; Opsal and Shelley, 2014; Perry, 2012; Weber et al., 2014). While the primary concerns focus on impacts to air,

water quality and quantity, and human health and quality of life issues, the controversies reflect underlying legal struggles for control over not just how UOGD occurs, but where it can occur and who has the power to enact appropriate regulations on land use policies and property rights laws in the context of UOGD.

A core aspect of these conflicts relates to concern regarding which set of collective actors at what governance scale can control where UOGD takes place or how it occurs. As such, a multitude of literatures have examined different multiscale governance approaches to developing regulatory policy for UOGDA plethora of scholarship focuses on the state or federal level governance process (i.e. see Apple, 2014; Davis, 2012; Davis, 2014; Davis and Hoffer, 2012; Freilich and Popowitz, 2012; Kitze, 2013; Knight and Gullman, 2014; Minor, 2014; Negro, 2012; Nolon and Polidoro, 2012; Rinfret et al., 2014), while others have explored the extent to which local governments have been able to enact regulations on UOGD, and the constraints they often face due to state preemption (see Enockson, 2014; Goho, 2012; Malin et al. forthcoming; Minor, 2014; Ritchie, 2014; Ryder, 2017; Toan, 2015). This includes municipal bans on hydraulic fracturing, and subsequent lawsuits filed by state or oil and gas lobbying bodies (see Malin et al., 2017; Negro, 2012; Ryder, 2017; Toan, 2015). At the most micro-scale of UOGD

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land use struggles, Malin (2014) explores direct on-the-ground conflicts between private landowners and interested drilling companies in the process of signing oil and gas leasing agreements. Collins and Nkansah (2013) also focus on this micro-level of land use conflicts, and find that citizens living on split estate properties tended to report more problems with drilling than those who lived on fee simple properties wherein they possessed ownership of both the surface and mineral rights. In particular, split estate owners often had poorer negotiating positions, and were less satisfied with industry compensation than their fee simple counterparts. The authors suggest that the findings of their research should encourage stronger policies regarding the rights of surface owners in the context of UOGD.

This work is critical as it highlights contemporary concerns for people, communities and the environment, it explains the current political and regulatory environment of UOGD, it advances the literature on UOGD, and informs policy development at the local, state, and federal level. Yet, outside of disagreements on well pad setback distances and surface disruptions (i.e. via truck traffic), the centrality of land use policy in understanding these conflicts is often overlooked. In addition, current literature on UOGD governance conflicts is frequently ahistorical, politically speaking. That is, they don't tell us how it is we got here. Little attention has been paid to the federal and state level conditions that have helped to create the space for land use conflicts in UOGD.<sup>1</sup> State preemption of local regulations of UOGD is often the starting point of the analysis—not why state preemption is the condition within which regulatory conflicts are confined in the first place. This also leaves little space for understanding the role of power in creating the current conditions of UOGD. The use of HI helps to frame this issue as one of power and power differentials (Amenta, 2012).

A critical component of land use policies that underlie conflicts over oil and gas development is mineral rights law. As such, to fully understand the way UOGD controversies are playing out and how policy development can move forward, we must situate it in the conditions which have shaped land use and mineral rights. We argue that past federal and state level governance decisions have created the conditions for UOGD land use conflicts today, and of particular importance is the issue of split estate law. Here, we utilize historical institutionalism (HI) to review the historical actors, processes, and institutions that have shaped how mineral rights have developed in the context of split estates in the U.S., bridging them to local-level conflicts which have emerged nationwide. We suggest that tracing this legislative and judicial history through HI is an essential foundation for exploring issues related to UOGD. Most importantly, we highlight these processes of governance as a bedrock for understanding spatial inequality inherent in current split estate law that grants the mineral estate dominance over the surface estate. We suggest that this codification of spatial inequality is problematic both in and beyond the context of UOGD, as it creates clear winners out of those who own or lease mineral rights (primarily those in the fossil fuel industry, and federal and state level governments, and sometime municipal governments) at the expense of surface users and surface rights owners who oppose UOGD either under their own private property or near critical communal surface use properties such as elementary schools in Weld County, Colorado (see Sweeney, 2016).

<sup>1</sup> Davis (2012) and Toan (2015) are notable exceptions to this. Davis (2012) provides a brief overview of the relationship between state level policy makers and oil and gas industry operatives and lobbyists since the 1930s. Toan (2015) contextualizes her research by providing an early federal background to oil and gas regulation at the national level, and traces oil and gas regulation through the history of the state of Colorado. However, her work is less focused on land use issues and more on broad industry regulation.

## 2. Historical institutionalism as a foundational framework for understanding mineral rights

Our analysis is guided by a flexible historical institutionalism (HI) perspective, which allows for the interweaving of *meso-domain analysis* (MDA), an interactionist-based perspective on social organization of the policy process across space and time. HI emerged in the 1980s and initially focused on understanding the conditions that shape the influence particular ideas have on policy makers, particularly in terms of macroeconomics, international relations, and social welfare (Campbell and Pedersen, 2001). Today the application of HI has moved beyond a pure focus on economic policies (see Amenta, 2012; Mahoney and Schensul, 2006; Pierson and Skocpol, 2002), and is used to conduct historical research which traces institutional processes and their influences on policy outcomes (Amenta, 2012) across space and time. These processes tend to constrain activities and produce routine consequences, whether intended or unintended (Amenta, 2012).

We use HI to pose the question: How have competing land use and property rights been shaped and mediated by institutional forms, means, and processes of governance over time and space? Further: How have certain practices and rights related to land use and mineral access become dominant over others? Finally, we ask: What external influences shaped governance institutions and processes regulating these practices? By 'institution' we mean both cultural and organizational forms as well as the actions and processes which utilize, adapt, reproduce, and alter those forms. North (1989) has suggested that institutions "connect past with present and future so the history is a largely incremental evolution in which the historical performance of economies can only be understood as part of a sequential story" (p. 238). We might suggest that while this notion of the sequential story is true, it is more likely that multiple, overlapping, complementary and/or contradictory stories are part of this evolutionary process, and the process extends beyond the range of authors and viewpoints from the past, in the present, and into the future. HI allows for an analysis that starts with a set of outcomes and works backward to trace influential processes which have led to the set of outcomes we face currently, making it an appropriate for understanding the outcomes of split estate law in the context of UOGD (Amenta, 2012).

Here we introduce our view of the policy and judicial process as a transformation of intentions across space and time, across policy phases and jurisdictions. At each temporal-spatial setting, the intentions are to shape conditions for governing behaviors in the future and across a distance.<sup>2</sup> They are designed usually for distal actors and future behaviors. However, we posit that contrary to strict path dependency models, these intentions can be modified, subverted, or resisted as well as furthered. As Thelen (1999 p. 383) suggests, "interactions and encounters among processes in different institutional realms open up possibilities for political change." Furthermore, policies influence political behaviors and future policy choices, while also itself influenced by political behaviors (Béland, 2010). Thus policy is (re)constituted in this processual movement across space and time. So from legislature and judicial rulings through bureaucracy and on, the stories of land, minerals, and industry are filled with gaps between intentions, behaviors, conditioning, contingency, and unpredicted and unintended consequences.

<sup>2</sup> Otherwise referred to as the exercise of metapower (Burns and Hall, 2012).

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