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State ex rel. Martinez v. City of Las Vegas: The Misuse of History and Precedent in Overruling the Pueblo Water Rights Doctrine in New Mexico

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I. Introduction

In *State ex rel. Martinez v. City of Las Vegas*, the Supreme Court of New Mexico struck the pueblo water rights doctrine[1] from New Mexico law.[2] Originally, recognition of the right stemmed from a belief that it existed under Mexican law in 1848, when the United States signed the Treaty of Guadalupe Hidalgo and promised to respect the vested property rights of people who lived in the territories the United States had taken from Mexico.[3] Under the doctrine, a city that succeeded a Spanish or Mexican colonization pueblo could take as much water from an adjacent watercourse as required for municipal purposes.[4] The right expanded, permitting a city to appropriate increasing amounts of water as its population grew.[5] This expansive quality, coupled with the fact that the pueblo right was paramount to the rights of all other users, was the primary reason that the doctrine was so controversial, since it meant that other users could lose rights vested under the doctrine of prior appropriation if a city were to grow and need more water.[6] After the doctrine was first adopted in the 1958 decision of *Cartwright v. Public Service*

[1] "Pueblo" is the Spanish word for town. The pueblo water right refers to rights claimed by municipalities that are successors to Spanish or Mexican colonization grants. These rights are to be distinguished from the water rights of Pueblo Indians, although they share some similarities. *Compare, e.g.*, Cartwright v. Public Service Co. of New Mexico, 343 P.2d 654, 664–69 (N.M. 1958) (describing the pueblo water rights doctrine), *with, e.g.*, State v. Aamodt, 618 F. Supp. 993, *passim* (D.N.M. 1985) (discussing the water rights of Pueblo Indians).
[2] *See* 89 P.3d 47, 48 (2004).
[3] *See Cartwright*, 343 P.2d at 659.
[4] State ex rel. Martinez v. City of Las Vegas, 89 P.3d 47, 48 (2004).
[5] *Id*. at 50.
[6] *See id*. at 50, 51, 59.

Co. of New Mexico,[7] it had come under regular attack by scholars who argued that historical evidence proved that the pueblo water right had no precedent in the law of either Spain or Mexico.[8] In 2004, when the New Mexico supreme court was presented again with the question of the doctrine's validity, it overruled *Cartwright*, thereby abolishing the pueblo water right in New Mexico.[9]

Although the residents of Las Vegas, New Mexico, may view the question differently, *State ex rel. Martinez* is not a particularly important decision. Las Vegas was the only New Mexico city that had ever been successful in claiming the right, so its abolition does not have far-reaching consequences for the rest of the state. Furthermore, water allocation in New Mexico is determined by a system of prior appropriation and beneficial use that is not affected by the elimination of the doctrine. As a result, *State ex rel. Martinez* is not likely to have much of an impact on the body of New Mexico water law as a whole. Nor is the opinion in any way groundbreaking in its analysis of the historical validity of the pueblo water right, since it builds on arguments previously made in the courts of New Mexico, Texas, and California. What is interesting about the opinion is not its what it has to say about water law at all. Instead, what

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[7] 343 P.2d 654 (1958).

[8] *See* DANIEL TYLER, THE MYTHICAL PUEBLO WATER RIGHTS DOCTRINE: WATER ADMINISTRATION IN HISPANIC NEW MEXICO 45 (1990); MICHAEL C. MEYER, WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY 1550–1850, 35, 159 (1984); NORRIS HUNDLEY, JR., THE GREAT THIRST: CALIFORNIANS AND WATER 1770S–1990S, 45 (1992); Jefferson E. LeCates, *Water Law—The Effect of Acts of the Sovereign on the Pueblo Rights Doctrine in New Mexico*, 8 NAT. RESOURCES J. 727, 731 (1968); Anastasia Stevens, *Pueblo Water Rights in New Mexico*, 28 NAT. RESOURCES J. 535, 535 (1988); Eric B. Kunkel, *The Spanish Law of Waters in the United States: From Alfonso the Wise to the Present Day*, 32 MCGEORGE L. REV. 341, 371–74 (2001); Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 WASH. L. REV. 869, *passim* (1994); Pierre Levy, Note *Which Right is Right: The Pueblo Water Rights Doctrine Meets Prior Appropriation*, 35 NAT. RESOURCES J. 413, 426–27, 433–34 (1995).

[9] *See* 89 P.3d at 58–62.

makes the opinion worth careful examination is how uses history, precedent, and the conventions of the appellate opinion in ways that at once reinforce and undermine its own authority.

State ex rel. Martinez's discussion of the pueblo water rights doctrine is primarily notable for its unprincipled use of history and the inconsistent application of the doctrine of stare decisis. Because the court's explication of the legal and historical sources of its decision is so irrational, and therefore, so intriguing to attempt to follow, this paper looks at the internal workings of the court's opinion rather than to the consequences it will have in the external world.

There are several obvious lines of analysis that this paper might follow, but which it does not: This is not a historical piece. It does not address the question of whether the pueblo water right actually existed under Mexican law in 1848 except insofar as necessary to set out the historical evidence that was presented to the *State ex rel. Martinez* court. In doing so, the paper does not try to interpret the primary sources that the court makes use of; nor does it evaluate the correctness of the books, law review articles, and other secondary source materials discussing the right. Instead, it takes the sources that were before the court at face value, and examines the ways in which *State ex rel. Martinez* seeks to make use of them.

This paper also does not attempt to assess whether the case was rightly or wrongly decided on either legal or policy grounds. Rather than evaluating *State ex rel. Martinez* with reference to history, law, or policy, this critique evaluates the text with reference to the expectations that the text itself establishes. In order to do so, it employs a formalist approach, in the sense of literary, rather than legal formalism.[10]

[10] It's probably more accurate to say that this reading borrows some formalist tools, since it isn't premised on formalist theories about how the meaning of a text is created. This reading doesn't assume that the text itself is the sole source its of meaning, or that the meaning of the case is not created by its author or by its readers. Instead, it is based upon a catholic perspective that presumes that meaning is produced by all three. In this way, the approach isn't strictly formalist,

In textual analysis, formalism refers to "a method of criticizing literary works that focuses on language and genre to the exclusion of other explanations for the work's meaning (such as historical context or author's intent)."[11] In the United States, formalist literary criticism came to prominence in the 1930s, in the works of the New Critics.[12] The New Critical method of literary analysis interpreted texts separate from any notion of authorial intent or social context, thereby "defending the autonomy of literature and demanding that it be judged by purely aesthetic rather than moral or political standards."[13] This attempt to isolate literary works from their social, psychological, economic, and political contexts has been criticized for romanticizing and depoliticizing texts,[14] and among literary scholars, New Criticism has generally been replaced with Marxist, psychoanalytic, reader-response, feminist, and deconstructionist theories.

But apart from its underlying assumptions about how texts are or are not socially situated, some of the formalist tools employed by the New Critics remain useful. The basic method of New Criticism is the technique of close reading, whereby the reader tries to "account for every detail of a single text as a part of an integrated whole."[15] Relying on an understanding of the literary conventions of a text's genre, the New Critics believed that a reader could evaluate the quality of a text by determining the degree to which its tensions and ambiguities were resolved

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and this particular reading is intended to be just one among many possible ways to look at the case.

[11] Jeffrey Malkan, *Literary Formalism, Legal Formalism*, 19 CARDOZO L. REV. 1393, 1393 (1998).

[12] *See* GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 114–15 (2000).

[13] BINDER & WEISBERG, *supra* note 12, at 115.

[14] *See, e.g.*, TERRY EAGLETON, LITERARY CRITICISM: AN INTRODUCTION 47 (2d ed. 1983) (stating that New Criticism "was the ideology of an uprooted, defensive intelligentsia who reinvented in literature what they could not find in reality. Poetry was the new religion, a nostalgic haven from the alienation of industrial capitalism.").

[15] BINDER & WEISBERG, *supra* note 12, at 116.

into a harmonious unity.[16] Although the New Critics primarily analyzed poetry, these methods of close reading and evaluation of a text based on generic expectations and internal coherence can be applied to other kinds of works as well.

The formalist approach used here involves a close reading that examines what qualities are understood to be necessary in a "good" appellate opinion, and looks at the degree to which *State ex rel. Martinez* succeeds in meeting the requirements of the genre. In that sense, this discussion of the case is elitist to the degree that, like the interpretations of the New Critics, it assumes some texts are inherently better than others, and that by reading carefully, one can determine which texts are good and which are not.[17] The New Critics felt that judging a text "is like judging a pudding or a machine," and that when evaluating the pudding, text, or machine, one simply "demands that it work."[18] Following in this formalist tradition, this reading attempts to show that, on its own terms and within the conventions of its genre, *State ex rel. Martinez* simply doesn't work.

II. *State ex rel. Martinez v. City of Las Vegas* and the Repudiation of the Pueblo Water Right

A. The *Cartwright* Precedent Establishing the Pueblo Water Rights Doctrine

[16] *See id*.
[17] This assumption that some judicial opinions are better than others has ethical as well as aesthetic implications. As one legal scholar puts it: the question of whether it is possible to distinguish a good legal argument from a bad one "is important because if we cannot distinguish between good and bad legal reasons, then we are ultimately in a world of total subjectivity. Power is the only thing that will matter. Our reasons will be nothing more than decorations." Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 737 (2004).
[18] W.K. Wimsatt & Monroe C. Beardsley, *The Intentional Fallacy*, in THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY 1, 4 (1954).

In 1958, New Mexico adopted the pueblo water rights doctrine in the case of *Cartwright v. Public Service Co. of New Mexico*.[19] There, plaintiffs claiming water rights to the Gallinas River sued the Public Service Company of New Mexico (PNM), arguing that the company was misappropriating the river's waters. PNM had been diverting water from the Gallinas and distributing it to both the Town of Las Vegas, New Mexico, and the City of Las Vegas, New Mexico. The Town of Las Vegas intervened in the suit and asserted its pueblo water right as an affirmative defense on behalf of the company. The Town claimed the right as a successor to the Mexican colonization pueblo, Nuestra Senora de Las Dolores de Las Vegas. When the case reached the Supreme Court of New Mexico, the court, relying heavily on a series of California cases establishing the right, recognized the pueblo water rights doctrine as the law of New Mexico's antecedent sovereigns, which would be respected as a vested property right under the Treaty of Guadalupe Hidalgo.[20]

B. Factual and Procedural Background.

The *State ex rel. Martinez* litigation began in 1978, when the New Mexico State Engineer filed a complaint demanding that the City of Las Vegas describe what right, if any, it had to use the water in the Pecos River system, including the Gallinas River. The City moved for partial summary judgment, claiming that, as determined by *Cartwright*, it had a pueblo right to use as much water from the Gallinas as necessary for municipal purposes.[21] The district court denied the motion for summary judgment, and after two appeals, the court of appeals held that the pueblo water rights doctrine was not valid under New Mexico law.[22] The Supreme Court of New

[19] 343 P.2d 645 (N.M. 1958).
[20] *See id*. at 659, 668, 669.
[21] City of Las Vegas v. Oman, 796 P.2d 1121, 1123 (N.M. Ct. App. 1990).
[22] *See* State ex rel. Martinez v. City of Las Vegas, 880 P.2d 868, 874 (1994). Clearly the fact that the court of appeals refused to follow the supreme court decision in *Cartwright* was an act of

Mexico granted certiorari and, agreeing with the court of appeals, overruled *Cartwright* and abolished the pueblo water rights doctrine.[23]

C. The Court's Proffered Rationale

In *State ex rel. Martinez v. City of Las Vegas*, the New Mexico Supreme Court examined the history of the pueblo water rights doctrine at great length, but declined to take a position on its historical validity.[24] Instead, the court overruled *Cartwright* because of its conclusion that the decision was "based on a flawed analysis of New Mexico water law."[25]

1. Intentional Indecision about History and the Pueblo Water Right

Cartwright's undertaking of an extended historical analysis of the pueblo water rights doctrine was based on the rule that a court may take judicial notice of the laws of antecedent sovereigns.[26] Because *Cartwright* determined that a pueblo water right existed under Spanish and Mexican law before the New Mexico territory was acquired by the United States, *State ex rel. Martinez* declined to treat the issue of its historical validity as if it were an issue of first impression.[27] The court emphasized the importance of stare decisis, and said that "the question is not whether we agree with the State Engineer's historical view of the law of antecedent sovereigns, but instead, whether this Court's historical analysis in *Cartwright* is so clearly erroneous as to create a compelling reason" to overrule it.[28] Although *State ex rel. Martinez* claims to use the "clearly erroneous" standard of review, the law of antecedent sovereigns is a

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overreaching that was addressed when the case reached the New Mexico supreme court. However, this portion of the *State ex rel. Martinez* decision is beyond the scope of this paper.
[23] *See* State ex rel. Martinez v. City of Las Vegas, 89 P.3d 47, 48–49 (2004).
[24] *See id*. at 55.
[25] *Id*.
[26] *See Cartwright*, 343 P.2d at 668.
[27] *See* 89 P.3d at 56.
[28] *Id*.

question of law to be reviewed de novo,[29] and the court seems to take such an independent review of whether the pueblo water right was a part of Spanish and Mexican jurisprudence.

The State Engineer argued the pueblo water rights doctrine as adopted in *Cartwright* was not historically accurate because it did not comport with the Spanish and Mexican practice of equitable apportionment and common use as described in historical documents like the Plan of Pitic and the *Recopilacion de Leyes de los Reynos de las Indias*.[30] *State ex rel. Martinez* rejected this argument, since such a view of history "conflicts with this Court's longstanding interpretation of water law . . . under Spanish and Mexican rule."[31] In previous cases, the supreme court had declared that "the law of prior appropriation existed under the Mexican republic at the time of the acquisition of New Mexico."[32] Because the current water law of New Mexico is "based on this Court's interpretations of the law of antecedent sovereigns," *State ex rel. Martinez* could not reject the pueblo water rights doctrine by accepting an alternate historical version of Spanish and Mexican law.[33] To do so would "undermin[e] the historical basis for New Mexico's adoption of the doctrine of prior appropriation as a legacy of antecedent sovereigns."[34] As a result, the supreme court held that "New Mexico does not recognize equitable distribution as the system of water law that survived the Treaty of Guadalupe Hidalgo."[35]

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[29] *See* 29 AM. JUR. 2D *Evidence* § 113 (1994).
[30] The Plan of Pitic was developed by the King of Spain and set out as the model for all colonization pueblos. *State ex rel. Martinez*, 89 P.3d at 50. The *Recopilacion de Leyes de los Reynos de las Indias* was a compilation of the laws governing New Spain that continued to be followed by Mexico at the time of the Las Vegas land grant in 1835. *Id*. at 50–51.
[31] *Id*. at 56.
[32] *Id.* at 57 (quoting United States v. Rio Grande Dam & Irrigation Co., 51 P. 674, 678 (N.M. 1898), *rev'd on other grounds*, 174 U.S. 690 (1899)).
[33] *Id*. at 56.
[34] *Id*. at 57.
[35] *Id*.

Taking a different tack, the court then observed that any reliance on historical evidence creates problems for the law, since "historical opinion can fluctuate based on newly found historical evidence or novel interpretations of extant sources."[36] The court asserted that "[u]nlike history as a matter of theory . . . the law, as reflected by the doctrine of stare decisis, requires a greater degree of certainty and predictability."[37] The court feared that if it were to adopt a historical analysis denying the validity of the pueblo water right, "the discovery of new evidence supporting the existence of the pueblo rights doctrine in Spanish and Mexican law would remain a possibility, which would undoubtedly lead to another dispute" over the legitimacy of the right.[38] Wishing to avoid these complications, the court found that when it comes to "property rights in general and water rights in particular . . . defining these rights based on prevailing scholarship would create an intolerable degree of uncertainty."[39] For this reason, the court refused to premise its rejection of *Cartwright* upon historical evidence that the pueblo water right did not exist under either Spanish or Mexican law.[40]

2. The Right's Incompatibility with New Mexico Water Law

The basis of the court's decision was instead that "the pueblo rights doctrine is inconsistent with New Mexico law and not protected by the Treaty of Guadalupe Hidalgo."[41] The perpetually expanding nature of the right would conflict with the foundation of New Mexico water law—the principle of beneficial use.[42] Because of this inconsistency, the court said that the

[36] *Id*.
[37] *Id*.
[38] *Id*. at 58.
[39] *Id*.
[40] *See id*.
[41] *Id*.
[42] *See id*.

historical legitimacy of the doctrine was "irrelevant" to its determination of the case.[43] It held that "[r]egardless of whether the pueblo water rights doctrine has a valid historical basis in the law of antecedent sovereigns, New Mexico water law, following the Treaty, precludes its recognition."[44]

The New Mexico Constitution requires that "beneficial use shall be the basis, the measure and the limit of the right to the use of water."[45] In New Mexico, as in other Western states, "it is only by the application of the water to a beneficial use that the perfected right to the use is acquired," and consequently, "an appropriator can only acquire a perfected right to so much water as he applies to beneficial use."[46] After an initial appropriation, water users must put water to use within a "reasonable time."[47] For municipalities, a reasonable time has been statutorily defined as forty years.[48] *State ex rel. Martinez* held that the pueblo rights doctrine was inconsistent with this system of beneficial use since a pueblo's successor would not be required to put water to use within a reasonable period of time of its appropriation.[49] Because the pueblo water right permits an unlimited expansion to meet the needs of an increased population, other appropriators might have their rights diminished and even extinguished as a city's population increased.[50] The court found that upholding the right would "intolerably interfere[] with the goals of definiteness and certainty contemplated by prior appropriation," and that such uncertainty could "paralyze others from legitimately making beneficial use of unappropriated

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[43] *Id*.
[44] *Id*.
[45] N.M. Const. art XVI, § 3.
[46] State ex rel. Cmty. Ditches v. Tularosa Cmty. Ditch, 143 P. 207, 213 (N.M. 1914) (quoted in *State ex rel. Martinez*, 89 P.3d at 58).
[47] *State ex rel. Martinez*, 89 P.3d at 59.
[48] *See* N.M. Stat. Ann. 1978 § 72-1-9 (Michie 2003).
[49] *See State ex rel. Martinez*, 89 P.3d at 59.
[50] *See id*.

waters on the same stream as a pueblo out of fear" that their rights would be extinguished as the pueblo grew.[51]

As additional evidence of the doctrine's incompatibility with New Mexico water law, the court observed that, unlike water rights under the system of prior appropriation, the pueblo water right is not forfeited when it is not used.[52] Believing that forfeiture is an "essential punitive tool" by which water is "made to do the greatest good [for] the greatest number,"[53] *State ex rel. Martinez* held that the pueblo water right would promote the "underutilization of essential public waters," and prevent the "efficient, economic use of water that is necessary for survival in this arid region."[54] Consequently, the court determined that the pueblo water right was incompatible with New Mexico water law.[55]

To further support the position that New Mexico should not recognize the doctrine, the court asserted that the expanding nature of the pueblo water right was not protected by the Treaty of Guadalupe Hidalgo.[56] United States courts have concluded that the treaty does not protect inchoate rights.[57] Because the court found that the expanding nature of the right that allowed increased water use in response to increased needs would have been "a matter of grace" and subject to the sovereign's power to reallocate water according to changing circumstances, it

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[51] *Id*.
[52] *See id*. at 60.
[53] *Id*. at 60 (internal quotation marks omitted).
[54] *Id*.
[55] *See id*.
[56] *See id*. *But cf.* State of New Mexico v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985) (finding that the Treaty of Guadalupe Hidalgo protected the expanding nature of an Indian Pueblo water right, such that the Pueblo had "a prior right to use all of the waters of the stream system necessary for their domestic uses and that necessary to irrigate their lands," and that this priority applied to the acreage in use up to the time of the treaty. Subsequent to that, the priority was protected by federal law.)
[57] *See id*. (citing Cartwright v. Public Service Co. of New Mexico, 343 P.2d 654, 687–91 (N.M. 1958) (Federici, D.J., dissenting) and United States v. City of Santa Fe, 165 U.S. 675, 713–16 (1897)).

determined that the expanding nature of the right was inchoate, and therefore not guaranteed by the treaty.[58] The court then stated that while it is "true that New Mexico has protected water rights in existence at the time of the Treaty and before the enactment of a comprehensive water code in 1907 . . .this protection has always been circumscribed by the principle of beneficial use and limited to vested rights."[59] Article XVI, Section 1 of the New Mexico Constitution states that "[n]othing contained in this article shall be construed to impair existing vested rights," but the court found that the expanding nature of the pueblo rights doctrine was not an existing right within the meaning of the constitution because of its incompatibility with the principle of beneficial use.[60]

The court concluded that a city founded under Mexican or Spanish colonization grants had water rights that are "recognized in New Mexico in the same manner as other municipal water rights."[61] The date of the colonization grant establishes the date of priority, but the priority date only applies to the amount of water that the municipality puts to use within a reasonable time of the initial appropriation.[62] Accordingly, the City of Las Vegas had a vested right only to the amount of water it put to use within a reasonable time of its initial grant.[63]

Because the pueblo water rights doctrine was found to conflict with New Mexico water law, the New Mexico Supreme Court held that the pueblo water right was a "doctrinal anachronism" that represented a "positive detriment to coherence and consistency in the law."[64]

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[58] *Id*.
[59] *Id*.
[60] *See id*. at 61.
[61] *Id*.
[62] *See id*.
[63] *See id*.
[64] *Id*. at 62 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) and Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

Under such circumstances, the court found that it had the "compelling reason" needed to overrule *Cartwright*.[65]

III. How the Opinion Actually Operates, or Why This Pudding Doesn't Work

A. Judicial Authority and the Generic Conventions of the Appellate Opinion

The appellate opinion has three main functions: first, to intervene in the external world, by forcing people to act in the manner prescribed by the text; second, to present a persuasive set of facts and a coherent line of reasoning to support the court's decision to intervene in the way that it has; and third, to reinforce its authority to intervene at all. A court can generally succeed in forcing the parties to act as directed, regardless of how well- or ill- constructed its opinion is, but the second two functions, because they depend on the effective use of language rather than on the power of the state, are harder to achieve. Success in presenting a persuasive rationale for the court's actions depends on the formulation of an internally coherent, intellectually sound argument for the court's position. The court's assertion of its own authority, in turn, rests on both the internal persuasiveness of its argument, as well as on certain literary conventions peculiar to the genre of the appellate opinion. *State ex rel. Martinez* attempts to legitimize itself by using many of the formulae that make up the appellate genre, but because the opinion fails to articulate a logical and coherent argument for its position, and because it rejects the conventional use of history and stare decisis, it fails to create the impression of internal authority necessary in a good appellate decision.

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[65] *Id*.

The reason that a judicial opinion must create a sense of its own authority, rather than relying solely on the authority conferred upon it by our system of government, is that establishing this kind of internal legitimacy is necessary to "reinforce [the judiciary's] oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do."[66] Because the judiciary is largely unelected, it "must always respond to the fundamental inconsistency of imposing a separate authority on the democratic process."[67] In addition to staking out its territory within our democratic system, the opinion must establish its authority as valid law, in that it arises from past authorities and may therefore legitimately serve as common-law precedent for future decisions. In these ways, appellate decisions are always "efforts at self-justification."[68]

In order to achieve these goals of self-justification and the legitimization of authority, opinions rely on generic formulae. Such formulae are in large part the result of practical considerations for the writer, in that "[f]requency of production, professional inclination, and political routinization" all require the use of conventional arguments and structures so as to "match experience and form in ways that a citizenry can recognize and accept."[69] Such formulae also have interpretive consequences for the reader, since "genre is perhaps the single most powerful explanatory tool available" in that it provides a schema that allows a reader to understand a text's purpose and meaning.[70] Every judicial opinion "must somehow use or misuse the possibility its structure evokes and the expectations that help structure its readers'

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[66] Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995).
[67] Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 207 (1990).
[68] PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 125 (1999)
[69] Ferguson, *supra* note 67, at 202.
[70] *Id*. at 217.

responses."[71] By examining some of the conventions of the genre, it becomes possible to see more clearly the ways that *State ex rel. Martinez* is able to use some of these conventions successfully to create an external veneer of legitimacy, while its simultaneous failure to make appropriate use of others undermines its legitimacy.

There are a number of basic structural elements that typically make up an appellate opinion.[72] These are what make a court decision immediately recognizable: the caption, a statement of facts, a description of the procedural history, a discussion of the evolution of precedent, and the disposition of the case. An opinion also includes citations to prior law in the form of statutes, cases, and constitutions, and may include citations to treatises and other secondary materials. In addition to including citations to these sources, a decision typically contains excerpts of these authorities as texts within the text. Often, even the grammatical structures that an opinion uses follow certain conventions, in that they are ones "identified by critical linguists as obfuscating the meaning of written communications."[73] All of these structural elements are easy to identify and fairly easy to imitate, and *State ex rel. Martinez* is successful in making use of them. By doing so, the text identifies itself as a judicial decision, and seeks to claim the authority that generally accompanies such a text.

Judicial opinions also employ particular rhetorical and narrative strategies to support their legitimacy. Some of the simplest of these include: formal language, which is often used by

[71] John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 451 (2001).
[72] For a detailed discussion of the use and purpose of some of the conventions discussed in this paragraph, see generally *id.*
[73] Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. Rev. 75, 75 (1998) (describing the author's statistical analysis of sentence structures used in judicial opinions and finding that federal jurisdiction opinions contain more obfuscatory language than cases decided on the merits).

"those who govern others. . . as a means of exercising power"[74]; the concealment of the author, both in refusing to acknowledge the role that clerks and other judges play in the authorship of an opinion, which suggests that the opinion wasn't negotiated, but was simply the product of right reasoning, and in eliminating the "I," which suggests that that reasoning isn't affected by personal bias; an objective tone, which seeks to maintain the illusion that judges simply apply the law to the facts of a case; the use of the parties as a metonymic substitute for their lawyers, which, rhetorically at least, eliminates the possibility that the outcome was reached because of lawyers' tactics rather than because it was the necessary result[75]; and the accretion of authority upon authority, which attempts to show that the court's decision is the logical outcome based on previous law.

Another significant rhetorical convention of the genre is the way that the judicial opinion takes the language of others (typically in the form of quotes from prior cases and other legal authorities) and employs it for its own ends. This appropriation is a part of what the Russian formalist Mikhail Bakhtin calls the "monologic" discourse that typifies authoritarian texts.[76] The appellate opinion incorporates the words of others into its own monologue, not to express the diversity of their views, but to bend them to support the ideas expressed in the opinion. An opinion will often raise alternative views, but only "within the controlling voice of the judicial speaker and with the foreknowledge that these alternatives will submit to that speaker's own authorial intentions." [77] By using other texts within the decision, the appellate opinion attempts

[74] *Id*. at 86–87 (citing the anthropologist Maurice Bloch, INTRODUCTION TO POLITICAL LANGUAGE AND ORATORY IN TRADITIONAL SOCIETY 23 (1975)).
[75] *See* Leubsdorf, *supra* note 71, at 471.
[76] *See* Mikhail M. Bakhtin, *Discourse in the Novel*, in THE DIALOGIC IMAGINATION: FOUR ESSAYS BY M.M. BAKHTIN 269–70, 342–44 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans. 1981).
[77] Ferguson, *supra* note 67 at 205.

to suppress the conflicts, contradictions, and differing perspectives embodied in those varied texts and make them appear to support the closed, unitary logic of the decision.

State ex rel. Martinez successfully uses these rhetorical strategies to help support its assertion of authority. By employing these conventions of objectivity, formality, and monologic discourse in combination with the structural elements of a judicial opinion, the text creates at least a superficial sense of its legitimacy. However, these efforts at self-justification are belied by the court's flawed reasoning and by its failure to use the conventions of historical truth and stare decisis in ways appropriate to the genre.

B. Historical Truth as a Convention of the Genre

State ex rel. Martinez's primary failure is in the way that it makes use of history. The presumption of the existence of historical truth is an important convention of the appellate opinion.[78] The quality of this kind of "truth" does not have to be absolute. A practical, consensus-based version of the truth is sufficient, but the legitimacy of the judicial process depends on the court's ability to determine "what really happened" with at least some plausibility.[79] This is because the consequences of judicial determinations are very real: "[l]egal interpretation takes place in a field of pain and death . . . a judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[80] If these acts of violence are to be socially sanctioned, they must rest on a belief that courts are competent to determine what actually happened in the past and to decide on that basis the consequences that should follow. For a court to suggest that it is unable to make decisions about

[78] *See id*. at 217.
[79] Stephen C. Yeazell, *Convention, Fiction, and Law*, 13 NEW LITERARY HIST. 89, 89 (1981).
[80] Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986).

"what really happened" is to give up a central function of the judiciary and one of the primary foundations of its legitimacy. This is exactly what *State ex rel. Martinez* does.

State ex rel. Martinez contains the remarkable statement that "the historical validity of the pueblo rights doctrine is irrelevant" to the court's determination that the doctrine should be overruled.[81] There is a whole host of problems with this statement, the main one being that it is almost nonsensical to argue that history is irrelevant in the adjudication of what are claimed to be preexisting historical rights. Under the Treaty of Guadalupe Hidalgo, United States courts are required to protect any property rights held by Mexican municipalities in 1848.[82] Under the New Mexico Constitution, "[n]othing contained in" the section of the constitution establishing the doctrine of prior appropriation and beneficial use "shall be construed to impair existing vested rights."[83] If the pueblo to which Las Vegas is a successor had an expanding water right in 1848, that right should arguably still be protected both under the Treaty of Guadalupe Hidalgo and the New Mexico Constitution. This would certainly appear at a minimum to be relevant, if not dispositive of the City's right to take and use the water today. Furthermore, rejection of the pueblo water rights doctrine without a determination about whether or not it is historically valid suggests that the court is permitted to nullify vested property rights arbitrarily, without even having to acknowledge that the rights existed in the first place. It may be that the court doesn't mind doing this because it is pretty sure that there was no pueblo water right under Mexican law, but if that is the case, what is interesting about *State ex rel. Martinez* is why the court isn't willing to just say so.

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[81] *State ex rel. Martinez*, 89 P.3d at 58.
[82] Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922, 929–30 [hereinafter Treaty of Guadalupe Hidalgo].
[83] N.M. Const. art XVI, § 1; N.M. Stat. Ann. 1978 § 72-9-1 (Michie 2003).

After examining historical evidence on the pueblo water rights doctrine, *State ex rel. Martinez* concludes that despite the overwhelming testimony and documentation indicating that the doctrine did not exist under Spanish and Mexican law, such evidence is not "sufficiently clear to justify overruling *Cartwright* on this basis."[84] Ostensibly, this is because the court places a great premium on the importance of the doctrine of stare decisis.[85] The court states that:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.[86]

These values are certainly important, but since the court goes ahead and overrules *Cartwright* anyway, the question really becomes why the court selected one basis on which to overrule existing precedent over another. It is not clear that the fact that the pueblo rights doctrine would conflict with the system of prior appropriation is necessarily more significant than the fact that the pueblo rights doctrine did not exist under Spanish or Mexican law.

The reason offered by *State ex rel. Martinez* is that historical truth is too difficult for the judiciary to get a hold of. Pointing to the fact that our understanding of history can "fluctuate based on newly found historical evidence or novel interpretation of extant sources,"[87] the court is essentially admitting that it is just easier to decide the case on the basis of a conflict with the current system of water use. But if it is true that the court avoids history because it's too hard to pin down, the court in effect abandons one of what are conventionally understood to be its

[84] *State ex rel. Martinez*, 89 P.3d at 56.
[85] *Id*.
[86] *Id*. at 55 (quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).
[87] *Id*. at 57.

primary functions:[88] to determine the truth of what happened in a particular case, and to mete out justice on that basis.

State ex rel. Martinez is right to say that one of the difficulties of evaluating history is that historical opinions "fluctuate," and that such fluctuation depends on both the theoretical perspective of the one looking at the facts as well as on the facts themselves.[89] Where the text fails to meet the requirements of the genre is in suggesting that these varying historical opinions can prevent the court from doing the job of making determinations about the past. *State ex rel. Martinez* says that "[u]nlike history as a matter of theory . . . the law, as reflected by the doctrine of stare decisis, requires a greater degree of certainty and predictability."[90] The risk is that if new historical evidence were discovered supporting the existence of the pueblo rights doctrine under Spanish and Mexican law, there would be more legal disputes over the validity of the doctrine.[91] The court finds that this risk creates "an intolerable degree of uncertainty."[92]

While the possibility of new evidence or changes in theories is certainly a risk, it can hardly be termed intolerable, since courts handle it all the time. In every case, the court (or the jury in its role as factfinder) has to make do with incomplete information in order to reconstruct the past and determine, for instance, who is liable, who is the rightful owner, whether the defendant committed the criminal act, and so on.

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[88] See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985) for an interesting discussion about the importance of convincing the public that a court's decision is a statement about the event itself—about the truth of what happened—rather than merely about the sufficiency of the evidence presented in a criminal trial. Nesson suggests that in order to make the members of the public internalize the behavioral messages that the law seeks to send, they must believe that the court's verdict is a statement about the truth of what actually occurred. *Id*. at 1361.
[89] *See State ex rel. Martinez*, 89 P.3d at 57.
[90] *Id*.
[91] *See id*. at 57–58.
[92] *Id*. at 58.

In this case, the question of the law of antecedent sovereigns appears to be not one of fact, but one of law, and it has been suggested that a court's process of arriving at appropriate legal principles and precedents is quite similar to the process a historian uses in looking at the past:

> There is, after all, a fairly close relationship between the day-to-day methodology of the judicial process and that of historical scholarship. When a court ascertains the nature of the law to be applied to a case through an examination of a stream of judicial precedent . . . it plays the role of historian. A historian might well say that in this process the court goes to the "primary sources."
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> Further, when a court finds it necessary, as it frequently does, to inquire into the circumstances surrounding earlier judicial expositions of the law, it gets still deeper into the writing of history. A historian would label the latter process "external documentary criticism," engaged in as a means to an adequate and sophisticated evaluation of the source in question.[93]

As another example of how courts manage the uncertainties posed by changing factual information and theoretical frameworks, courts frequently have to base decisions on the expert testimony of scientists who, like historians, are always reevaluating and retesting their hypotheses. Courts manage to assess the likelihood that a particular scientific theory is valid by using such tools as the *Daubert*[94] factors, cross-examination of the expert, and the presentation of contrary evidence. Historians have suggested that this is a valid method of rooting out historical truth as well,[95] arguing that while "historical 'truth' may be ephemeral, historical 'falsity' is not. In other words, historical interpretations . . . can be assessed by examining the

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[93] Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. CT. REV. 119, 121.
[94] *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 594–96 (1993).
[95] *See e.g.*, Reuel E. Schiller, *The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness*, 49 HASTINGS L.J. 1169, 1176 (1998) ("[T]he adversarial process is an excellent buffer against those who would abuse historical truths in the interest of their client. Through the use of rival experts and impeaching cross-examination, lawyers put historians' testimony through a crucible that uncovers biases, flawed data, laughable interpretations, and outright deceit.").

degree to which they follow the professional norms of academic and legal historians, and by examining whether they have foundation in historical evidence."[96] Because the court is necessarily so practiced in its ability to take a look at documentary evidence and expert testimony, its claim to lack competence in this area sounds a false note.

Even if, as the court suggested, "[a] trial often demands more than a historian can offer" since it "asks for definitive answers when a historian may prefer to give cautious, conditional answers,"[97] this doesn't relieve the court of its responsibility to at least be willing to search for the truth. While concepts like "*proof* [and] even *truth* . . .have acquired in the social sciences an unfashionable ring,"[98] they maintain their power in our justice system. This is because trials are "a form of inquiry into past events [that begin] with the underlying assumption of some kind of correlation between our statements about the world and the world itself"[99]—that is, between the evidence presented about what happened and what actually took place. If the court refuses to make a commitment to the facts of a case, it undermines its authority as an arbiter of the truth.[100]

C. Stare Decisis as a Convention of the Genre

Adherence to precedent is another way that judicial opinions assert their legitimacy, and *State ex rel. Martinez* at least attempts, albeit unsuccessfully, to make use of this convention in

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[96] Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POLITICS 809, 818 (1997).
[97] Schiller, *supra* note 95, at 1175–76.
[98] Carlo Ginzburg, *Checking the Evidence: The Judge and the Historian*, *in* QUESTIONS OF EVIDENCE: PROOF, PRACTICE, AND PERSUASION ACROSS THE DISCIPLINES, 290, 294 (James Chandler et al., eds. 1994) (emphasis in original).
[99] *Id*. (internal quotation marks omitted).
[100] Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 908 (1993) ("[T]he Court relies on history to provide a constraint on judicial decisionmaking. Justices want very much to make it appear that their decisions are not based on their personal opinions, but instead are derived from an external source. The Court has expressly defended history on this ground—that it provides an objective basis for decisions as an alternative to impermissible value imposition by the Court.").

order to justify its rejection of history. The doctrine of stare decisis is one way that judicial opinions maintain the fiction that they are simply applying, rather than making law. Furthermore, by relying on the law as established in past opinions, an appellate decision suggests that the law is knowable and predictable.[101] In its adherence to past precedent, an opinion demonstrates its rejection of "precipitate, individualized, and arbitrary action,"[102] and offers assurance that judicial decisionmaking is determined, rather than impulsive and uncontrolled. *State ex rel. Martinez* expressly recognizes the importance of stare decisis to a decision's efforts at self-justification when it states that the doctrine of stare decisis is based in part on "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."[103]

The *State ex rel. Martinez* court faced the problem of how to ascertain the nature of Mexican municipal water law in 1848. The court was presented with three conflicting views of the history of the law. Two of these, at least according to the evidence before the court, were essentially judicially constructed and not based in historical fact: According to the evidence presented in the case, the pueblo water rights doctrine appeared to be an invention of the California judiciary.[104] Similarly, *State ex rel. Martinez* admits that the doctrine of prior appropriation is "based on this Court's interpretation of the law of antecedent sovereigns."[105]

Among the court's choices, the third version of history—that the Mexican legal system followed the system of equitable apportionment and common use—seems to be best supported by the historical evidence before the court, since it is argued by the State Engineer, it can be inferred from the Plan of Pitic and the *Recopilacion*, and since several secondary sources cited

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[101] *See* Yeazell, *supra* note 79, at 93.
[102] Walter Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 FORDHAM L. REV. 272, 292 (1936).
[103] *State ex rel. Martinez*, 89 P.3d at 55.
[104] *See* State ex rel. Martinez v. City of Las Vegas, 880 P.2d 868, 871–74 (1994).
[105] *State ex rel. Martinez*, 89 P.3d at 56.

by the court seem to endorse it. Ironically, it is this version of history that *State ex rel. Martinez* dismisses most easily. This would be fine if the opinion were intellectually forthright and stated that the court will not adopt a system of equitable apportionment because New Mexico has adhered to the doctrine of prior appropriation since the early 1900s, and it is just too late and too complicated to change things now. But the court doesn't do this. Instead, *State ex rel. Martinez* takes the position that its description of historical facts does not have to have its referents in historical reality since history is what the court says it is.

Pointing out that earlier New Mexico decisions had declared that the system of prior appropriation and beneficial use was the system in place under Spanish and Mexican law, *State ex rel. Martinez* refuses to abandon the pueblo rights doctrine based on the State Engineer's argument that historical evidence shows that Mexico followed a system of equitable apportionment and common use. Rather than making decisions founded on the historical evidence before it, the court stuck to the version of history that it had created in its earlier opinions. This was because an acknowledgment that equitable apportionment was the system actually used would "undermin[e] the historical basis for New Mexico's adoption of prior appropriation as a legacy of antecedent sovereigns."[106]

The reasoning of this statement is strange. To refuse to admit that one version of history (the pueblo water right) is inaccurate because doing so would require an admission that a second version (equitable apportionment) is accurate, which in turn would mean that the version adopted by the court (prior appropriation) is wrong, suggests that the court has no duty to the truth. *State ex rel. Martinez* forecloses recognition of historical fact in the interest of maintaining a made up version of the past because it cannot "reject the pueblo rights doctrine through a recognition of

[106] *Id*. at 57.

equitable apportionment without undermining" the version of history it previously endorsed.[107] What this means is that the court wants to stand by this historical fiction simply because it is its own creation. While this at least suggests that stare decisis is a guiding principle in the case, it does not turn out to be a reasoned or consistent one.

Such stubborn adherence to what appears to an incorrect view of history might be validated by the fact that "once a historical interpretation has been made by the Court . . . principles of stare decisis render the historical interpretation into law through the same common law processes that render interpretations of case law into judicial precedent."[108] But here the court selectively applied the principle of stare decisis to one historical interpretation supported by precedent—the doctrine of prior appropriation—but not to the pueblo rights doctrine, which was also supported by the precedent created by *Cartwright*. It is history by judicial fiat either way.[109] Because the court offers no principled reason for applying the doctrine of stare decisis to some cases and not to others, its use becomes arbitrary, and the doctrine loses its value as a restraint on arbitrary judicial decisionmaking.

D. Flawed Reasoning and the Conflict between Public Policy and Historical Rights

Since *State ex rel. Martinez* declines to dispute the historical determination made in *Cartwright*, the court must logically begin its discussion eliminating the pueblo water right from New Mexico law with the premise that such a right existed historically, as determined by *Cartwright*. The court then faces the problem of how to get rid of the doctrine without doing damage to the legitimacy of its prior decision—and by extension, the legitimacy of the court. This is a difficult task. To nullify the right without a finding that the right never existed in the

[107] *Id*.
[108] Richards, *supra* note 96, at 840.
[109] *See* Kelly, *supra* note 93, at 122.

first place leaves the court exposed to charge of relieving people of their property rights as a matter of convenience and without compensation. In order to get around its original problem with history, *State ex rel. Martinez* takes another route: It finds that while the pueblo water right may have existed under Mexican law, it was extinguished in 1848 when the Mexican government signed the Treaty of Guadalupe Hidalgo. By eliminating the right in this way, *State ex rel. Martinez* is more at liberty to overrule the doctrine on public policy grounds. But because the opinion's analysis of whether the right should be recognized under the Treaty is deeply flawed and internally contradictory, and because the court's discussion of the right's conflict with current New Mexico water law is based on its earlier irrational use of historical evidence, the court's public policy rationale fails on its own terms.

1. The Treaty of Guadalupe Hidalgo and Inchoate Property Rights

Mexico ceded almost half of its territory to the United States in 1848.[110] Under the Treaty of Guadalupe Hidalgo, Mexicans who lived or owned property in this territory were assured that people "now established in territories previously belonging to Mexico . . . shall be free to continue where they now reside . . . retaining the property which they possess in the said territories."[111] Even absent landowners were promised that "property of every kind, now belonging to Mexicans not established there, shall be inviolably respected."[112]

Because the treaty was not considered to be self-executing, Congress required property owners holding title pursuant to Spanish and Mexican land grants to have their rights confirmed by the United States government.[113] Congress passed the Act of March 3, 1891[114] establishing

[110] *See* Christine A. Klein, *Treaties of Conquest, Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. Rev. 201, 201 (1996).
[111] Treaty of Guadalupe Hidalgo, *supra* note 82 at 929.
[112] *Id*. at 929–30.
[113] Klein, *supra* note 110, at 208.

the Court of Private Land Claims, which would determine whether titles to property claimed under Spanish and Mexican grants were valid.[115] The Act prohibited the confirmation of inchoate rights, stating that no "grant or other authority to acquire land, made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated" in the grant.[116] The Supreme Court broadened this provision to mean that under the Act, the court of private land claims could only confirm a right that had not been perfected if "the claimant could, *by right*, and *not by grace*, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States."[117]

Cartwright determined that the pueblo water right was a form of property protected by the treaty and expressly stated that it was a vested right.[118] In contrast, *State ex rel. Martinez* concluded that the pueblo water right was an inchoate right that did not come under the protections of either the Treaty of Guadalupe Hidalgo or the New Mexico Constitution.[119] The court made this about-face by drawing an analogy between a community's right to land granted for community use and a city's right to water under the pueblo water rights doctrine. *State ex rel. Martinez* cited two United States Supreme Court cases holding that communal ownership of land under Mexican law was an inchoate right not protected by the treaty.[120] In both *United States v. City of Santa Fe* and *United States v. Sandoval*, successors to Spanish and Mexican land grants filed petitions in the Court of Private Land Claims seeking confirmation of their property rights.

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[114] 26 Stat. 854.
[115] Klein, *supra* note 220, at 226.
[116] 26 Stat. at 860.
[117] Ainsa v. United States, 161 U.S. 208, 223 (1896) (emphasis added).
[118] *See Cartwright*, 66 N.M. at 659, 668.
[119] *State ex rel. Martinez*, 89 P.3d at 60–61.
[120] *Id*. at 60 (citing United States v. City of Santa Fe, 165 U.S. 675, 714 (1897) and United States v. Sandoval, 167 U.S. 278, 293–94 (1897)).

Each case involved a land grant that permitted some portion of the pueblo to be assigned to the community as a whole. The Supreme Court examined sources of Spanish law and found that, unlike property allotted to individual settlers, land designated as community property remained subject to the authority of the king, since the king was free to reassign it to private individuals.[121] Because possession of the common lands existed at the grace of the sovereign, and neither the settlers nor the town could make a claim as of right to fee title to the property,[122] the right to such lands was not protected by the Treaty of Guadalupe Hidalgo.[123]

Under the Plan of Pitic, the pueblo water right, like the right to common lands, was subject to the discretion of the Spanish and Mexican governments since the Plan states that "water privileges . . .shall continue as long as they are not changed or altered by his Majesty."[124] As a result, these Supreme Court cases would provide a pretty good foundation on which to rest a claim that the pueblo water right did not survive the Treaty of Guadalupe Hidalgo. However, in order to make this argument, *State ex rel. Martinez* has to rely on the very historical interpretation of Spanish and Mexican water law that it had refused to recognize earlier in the opinion: the doctrine of equitable apportionment.

The court reasons as follows:

> To the extent that Spanish and Mexican law recognized a pueblo water right, the nature of the right that allowed increased water usage in response to growing needs of the pueblo would have been a matter of grace, not a matter of right; future expansion of water rights subsequent to the colonization grant would have been

[121] United States v. City of Santa Fe, 165 U.S. at 709; United States v. Sandoval, 167 U.S. at 295–97.
[122] United States v. Sandoval, 167 U.S. at 298.
[123] *See* United States v. City of Santa Fe, 165 U.S. at 713–16; United States v. Sandoval, 167 U.S. at 293–94.
[124] Plan of Pitic, Sec. 7, *quoted in Cartwright*, 343 P.2d 654, 677 (Federici, D.J., dissenting).

> subject to the sovereign's power of reallocation according to a change in circumstances.[125]

As the only evidence in support of the claim that antecedent sovereigns retained control over the right to increasing amounts of water, the court cites to a sentence in a law review article stating that "[e]ach grant petition occasioned an official reevaluation of the adequacy of water supplies in the particular vicinity."[126] From this single sentence, the court is able to conclude: "Thus, the expanding quality of the water right, being inchoate, was not guaranteed by the Treaty."[127]

The problem with this line of reasoning is that the quoted sentence itself at least suggests that water was allocated on equitable principles—for why else would a government need to adjust water rights based on "the adequacy of water supplies in a particular vicinity" if not to ensure the adequacy of water supplies for all the users in the area? But regardless of whether or not reallocation would be based on equitable principles, this kind of redistribution certainly wouldn't comply with the doctrine of prior appropriation, which *State ex rel. Martinez* has already claimed was the law under the Spanish and Mexican governments. Furthermore, an examination of the rest of the cited article reveals that it is devoted to the thesis that pueblos, like other water users, were allotted water rights based on a system of equitable apportionment.[128] *State ex rel. Martinez* therefore depends on the historical doctrine it previously rejected in order to reach its conclusion that the pueblo water right, presuming it existed, was not protected under

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[125] *State ex rel. Martinez*, 89 P.3d at 60.
[126] *Id*. (citing Stevens, *supra* note 8, at 569).
[127] *Id*. at 60.
[128] *See* Stevens, *supra* note 8, at 568–81. Stevens points out that petitions for grants were "granted, denied, or issued, with express conditions designed to prevent prejudice to third parties," *id*. at 569, and that Spanish and Mexican law provided for adjudication proceedings in which "the water users of a vicinity were given the opportunity to demonstrate their needs and their claims of right" *id*. at 570. The judge would assess relative water rights based on "(1) prior use, (2) legal right, (3) need, (4) prejudice to third parties, (5) intent or purpose of use, and (6) equity and the common good," and these factors were "balanced against the countervailing interests of other claimants in order to reach an allocation that achieved the greatest common good and with the least harm to third parties." *Id*. at 574.

the Treaty of Guadalupe Hidalgo. The court offers no explanation as to why equitable apportionment was not the law of Spain and Mexico in Part A of its discussion of the pueblo water rights doctrine, but becomes the law of Spain and Mexico in Part B, when the court wishes to claim that the pueblo water right is not a vested right.

2. The Incompatibility of the Pueblo Water Rights Doctrine and General Principles of New Mexico Water Law

Although *State ex rel. Martinez* is able to nullify the pueblo water right by claiming that, by definition, a pueblo's expanding water right could never be vested, this historical argument is not the sole foundation of the court's opinion. The inchoate nature of the right is only one of three points in *State ex rel. Martinez*'s argument that the pueblo water rights doctrine is inconsistent with the general principles of New Mexico water law.[129] The first of these points is that New Mexico adheres to the doctrine of prior appropriation and beneficial use. The second is that the pueblo water right is not a vested right under New Mexico law. The third is that the pueblo water right would make the State Engineer's duty to adjudicate water rights more difficult. None of these reasons provides an adequate basis for overruling *Cartwright* in the absence of a determination that the right did not exist historically.

While New Mexico follows the doctrine of prior appropriation and beneficial use, this doctrine was not formally adopted until 1907.[130] Because this would have been after the 1835 vesting of Las Vegas's pueblo water right (assuming that such a right existed and could be vested) New Mexico would be obligated to respect and uphold the pueblo water right under the Treaty of Guadalupe Hidalgo and the New Mexico Constitution. It is true that the protections of the treaty have been increasingly narrowed by statute and by court decisions, such that the treaty

[129] *See State ex rel. Martinez*, 89 P.3d at 60–61.
[130] *See id*. at 60.

might no longer protect the right.[131] However, the protections of the New Mexico Constitution have not been so narrowed. As a result, the fact that the pueblo water right arguably conflicts with the doctrine of prior appropriation is, under the New Mexico Constitution, not a valid reason for abrogating the right.

Nor is the claim that the right is inchoate. At least one other court has found that a settlement's expanding water right was a vested right that was protected by the Treaty of Guadalupe Hidalgo.[132] The New Mexico Constitution specifically provides an exception to the general rule of prior appropriation and beneficial use when a water right has vested before the adoption of the constitution.[133] There is no reason that a property right that can only be realized in the future must necessarily be considered inchoate. A vested right is defined as "[h]aving become a completed, consummated right for present *or future* enjoyment; not contingent; unconditional; absolute."[134] The pueblo water right is not contingent upon any conditions, but, if, as the court claims in one section of its opinion, it is subject to reallocation by the sovereign, it may not properly be termed "absolute." In this way, the inchoate nature of the right is necessarily predicated on the fact that equitable apportionment was the law of Spain and Mexico. If, as the court says in another section of its opinion, Spanish and Mexican law did not follow the system of equitable apportionment, then the decision offers no factual support for its conclusion that the right is inchoate rather than vested.

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[131] *See e.g.*, Ainsa v. United States, 161 U.S. 208, 223 (1896); United States v. City of Santa Fe, 165 U.S. 675, 713–16 (1897); United States v. Sandoval, 167 U.S. 278, 293–94 (1897).
[132] *See* State of New Mexico v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985) (finding that the Treaty of Guadalupe Hidalgo protected the expanding nature of an Indian Pueblo water right, such that the Pueblo had "a prior right to use all of the waters of the stream system necessary for their domestic uses and that necessary to irrigate their lands.")
[133] N.M. Const. art. XVI, § 1.
[134] Black's Law Dictionary 1557 (7th ed. 1999) (emphasis added).

The final reason *State ex rel. Martinez* offers to justify its decision overruling the pueblo water rights doctrine is that continuing to recognize the doctrine would make it more difficult for the State Engineer to regulate water rights. This is almost certainly true, but the court devotes little attention to the development of this rationale. Without discussion, the court merely cites statutes requiring the State Engineer to prepare a comprehensive state water plan, to adhere to the requirements of interstate water compacts, and to protect and conserve water.[135] As the only reason for its decision that is not undermined somewhere else in the opinion, the imposition on the State Engineer is the strongest justification offered by the court for overruling the pueblo water rights doctrine. Unfortunately, *State ex rel. Martinez* fails to bolster this rationale with any significant discussion of its importance, relying instead on the claim that the pueblo water right is inchoate and conflicts with the doctrine of prior appropriation. As a result, the court offers no support for an argument that concerns about the complex responsibilities of the State Engineer should outweigh the dictates of either the Treaty of Guadalupe Hidalgo or the New Mexico Constitution.

IV. Conclusion

State ex rel. Martinez doesn't work because it fails meet the generic requirements of an appellate opinion, and consequently fails to support its claim to authority. On the one hand, the text makes use of conventional forms and relies on the types of reasoning thought necessary in a judicial decision. These help to create a sense of the opinion's legitimacy, and at this level, the opinion is a success: It has sections labeled "Factual and Procedural Background," "Historical Basis for the Pueblo Rights Doctrine," and so on, and it refers to prior case law, to statutes, and

[135] *State ex rel. Martinez*, 89 P.3d at 61.

to the law of antecedent sovereigns, and discusses how these laws apply to the facts of this case. But once past these outward signs of a valid judicial decision, the opinion falls apart.

State ex rel. Martinez erodes any authority created by its structural forms and rhetorical conventions by failing to reach the degree of coherence and analytical integrity necessary in an appellate court's published decision: A supreme court opinion is not a poem, and if it behaves like one, it has failed. *State ex rel. Martinez* skips from one idea to another with the hope that the reader's affective response to the repetitive use of motifs like stare decisis, inconsistency with New Mexico water law, inchoate rights, and the changing nature of historical interpretation will carry her over the logical gaps. Needless to say, the motifs don't do the trick, and one is sorry that the opinion seems to try.

Rather than attempting to claim that history is irrelevant in the adjudication of historical property rights; rather than clinging to what the court offers as a judicially invented historical scenario; rather than using the doctrine of stare decisis inconsistently to serve what may be legitimate policy concerns, the court could have simply said that an examination of the historical evidence currently available has made it clear that there never was an expanding pueblo water right under Spanish or Mexican law, and overruled *Cartwright* on this basis. It could have then suggested that even if it were later discovered that such a right existed, its historical validity could not outweigh the social and environmental costs of allowing successors to colonization pueblos to extinguish the rights of prior appropriators, or the administrative costs of asking the State Engineer's office to manage the adjudication of an ever-changing water right. Whether or not that kind of an opinion would have been right on legal or policy grounds, such an approach would have eliminated the need for all of the inconsistencies that currently detract from *State ex rel. Martinez*. That kind of opinion would have worked.