Rovas, Its Progeny, and the Rule of Law

Persuasive Authority or *Chevron* by Another Name?

By Zach Larsen

At a Glance

- The Michigan Supreme Court's *Rovas* decision firmly rejected deference to administrative agencies' legal positions based on separation-of-powers principles, but nonetheless adopted a test that suggests a form of deference.
- Subsequent decisions by Michigan's appellate courts have framed the *Rovas* inquiry like *Chevron* in the inverse, asking whether the agency's interpretation is reasonable and, if so, whether the statutory language plainly contradicts the agency's position.
- The principles that supported *Rovas* are at odds with that precedent's current application, resulting in inconsistent results from the Court of Appeals and requiring further clarification of the law.

During its October 2018 term, the U.S. Supreme Court narrowly declined to revisit a crucial question about whether deference is due to the unpromulgated legal positions of administrative agencies. In *Kisor v. Wilkie*,[1] a deeply divided Court split 4–1–4 in refusing to overrule (but choosing to restrict) what has become known as *Auer* deference.[2] *Kisor* leaves federal law on this question unsettled, and the Court will likely need to revisit it in the future.

Like the uncertainty left by the U.S. Supreme Court in *Kisor*, uncertainty haunts the landscape of Michigan administrative law on a similar question: how should courts treat administrative agency interpretations of laws the agencies administer? Should such interpretations be merely brushed aside? Should they control if a statute is silent or ambiguous? Is there an appropriate in between?

That uncertainty betrays a conflict between the Michigan Supreme Court's firmly anti-deference justification of the "respectful consideration" standard in *In re Rovas*,[3] its articulation of the standard, and its later application of the standard. The latter has given the impression that Michigan has adopted a *Chevron*-type standard[4]—referring to *Chevron USA, Inc v. Natural Resources Defense Council, Inc*, the 1984 U.S. Supreme Court articulation of the weight given to agency interpretations of the law—even though *Rovas* was largely seen as anti-*Chevron*.[5] If Michigan is moving towards a *Chevron*-type deference, citizens and litigants would be better served if the Court would expressly say so. As it stands, the state's caselaw is unclear.

Definitely not deference: The principles of *Rovas*

The current quandary started with a bang. *Rovas* roared against deference, eulogizing the separation of powers and the rule of law. In the waning hours of Michigan's famously textualist Court,[6] the *Rovas* majority declared that unlike the federal courts, Michigan would recognize a strict separation of powers in its administrative law.[7]

With remarkable clarity, *Rovas* carefully distinguished the administrative agency functions not at issue in that case in order to more directly call out the principle it was reforming.[8] *Rovas* was concerned only with the legal opinions of executive agencies that were not adopted through formal Administrative Procedures Act (APA) processes.[9] Duly promulgated APA rules were (and are still) binding law[10]—assuming the agency acts within a proper legislative delegation.[11] Unpromulgated legal guidance, sometimes called by the misnomer of interpretive rules,[12] was different. For such guidance, there could be no deference.[13]

Deference, informed the *Rovas* majority, was both a violation of the separation of powers and a failure by the judiciary to do its job.[14] The core judicial duty is to "say what the law is"[15]—so said Chief Justice John Marshall in *Marbury v. Madison* (as every attentive 1L knows).[16] That duty and prerogative could not be delegated,[17] and, as *Rovas* explained, giving deference to administrative agencies' legal interpretations upsets that balance.[18] By permitting an agency to take legal positions that, in many instances, effectively bound the judiciary without clearly delegated authority from the legislature or the input of the arduous, quasi-legislative rule-making process, an agency could cement a view of a statute it administers to the detriment of independent judicial review.

The Michigan Supreme Court would not stand for that. At least, not at that time.

Instead, the *Rovas* Court decided that the appropriate standard for reviewing agency interpretations was to give them "respectful consideration."[19] Deriving that standard from the septuagenarian case of *Boyer-Campbell v. Fry*,[20] the *Rovas* Court explained that the "standard requires 'respectful consideration' [of] and 'cogent reasons' for overruling an agency's interpretation" of the law.[21] *Rovas* further noted that "when the law is 'doubtful or obscure,' the agency's interpretation is an aid for discerning the Legislature's intent."[22] But it "is not binding on the courts" and "cannot conflict with the Legislature's intent as expressed in the language of the statute,"[23] echoing a statement earlier in the opinion that "[a]n agency's interpretation, *to the extent it is persuasive*, can aid" a court's search for a statute's meaning—but nothing more[24] [emphasis added].

What *Rovas* got wrong (but mostly right)

Rovas had its problems from the start. The rediscovery of the respectful consideration standard occurred without much discussion as to how the standard had been employed in the past or its origins in and connection to later federal law. The legal backdrop for the Michigan Supreme Court's *Rovas* opinion was the U.S. Supreme Court's *Chevron* standard, which counsels deference to administrative agency interpretations of the law where a statute is silent or ambiguous and the agency's interpretation "is based on a permissible construction of the statute."[25] But, while respectful consideration was heralded as both anti-deference and anti-*Chevron*,[26] the two standards were, in fact, cousins. *Boyer-Campbell* had plucked its respectful consideration standard from *United States v. Moore*,[27] a case in which the U.S. Supreme Court articulated reasons why a naval officer's interpretation of the laws that officer administers *should* be deferred to.[28] And, in settling on its deference standard, *Chevron* cited *Moore* as an example of authorities showing the "considerable weight" that "should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[29]

Well before *Rovas*, Michigan courts had also struggled to identify what precisely "respectful consideration" meant in practice. Some decisions, like the Michigan Supreme Court in *Paye v. Grosse Pointe*,[30] an immediate successor to *Boyer-Campbell*, stated clearly that it did not mean deference and emphasized the independent judicial duty to analyze the law.[31] Others reached the opposite conclusion.[32]

Given this history, it is unsurprising that the *Rovas* Court also struggled to define its respectful consideration standard to clearly convey the review that agency interpretive guidance deserved. The Supreme Court said courts should "give respectful consideration" to an agency interpretation and that such an interpretation "will not be overruled absent cogent reasons."[33] But what did it mean? To respectfully consider was plainly not deference. Yet did not the second half of the *Rovas* formulation—that courts should not "overrule" an agency's legal position "without cogent reasons"—essentially require deference? Or did it simply express the obvious point that courts should not reject agency interpretations without reasonable cause? The standard was difficult to comprehend.

Despite these flaws, the core concept the Court deployed in *Rovas* was both constitutionally correct and crucial to the rule of law: the judiciary must say what the law is.[34] That job does not belong to the executive whose core job description is to "faithfully execut[e]" the law adopted by the legislature.[35] The separation of powers required by the Michigan Constitution[36] demands that an independent judiciary guard its core function with the same vigilance the Court has employed in guarding other judicial functions.[37]

The judiciary certainly can (and should) consider an administrative agency's legal position and may find it persuasive. But it should not surrender its judgment in the face of mere ambiguity or lack of clarity. After all, legislative ambiguity and lack of clarity is the stuff of good appeals—the type of case that should (and does) make it to the upper echelons of Michigan's judiciary, especially when the executive branch cannot be bothered to promulgate a rule indicating its view of the law. The Michigan APA, likes its federal counterpart, seeks to impose democratic inputs and rule-of-law standards on agencies.[38] Encouraging the circumvention of the APA merely blesses undisciplined agency behavior and undermines not only separation-of-power principles but also the APA. So the core idea in *Rovas* was right: the judiciary should hear an agency out—even listen *especially* carefully to an organization that routinely applies a law—but it should not concede the basic duty and expertise of the judiciary.

Frame that standard as respectful consideration. Or say instead that agency guidance is non-binding but persuasive authority. The point is that the courts must exercise independent judgment. They may adopt the views of administrative experts if those views are convincing. Yet they can rely on no one else to resolve a tough legal question.

Where we are now: "*Rovas* is dead, long live *Rovas*!"

With some courts emphasizing the second half of the *Boyer-Campbell* standard—that an agency interpretation should not be overruled without cogent reasons—the anti-deference *Rovas* has transformed into a deference standard.

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The first move away from anti-deference principles of *Rovas* was the Michigan Supreme Court's unsigned memorandum opinion in *Younkin v. Zimmer*.[39] There, an injured worker challenged a decision by the Department of Licensing and Regulatory Affairs (LARA) to hold hearings in Lansing when he lived "about 70 miles" away in Genesee County and the statute required hearings to "be held in the locality where the injury occurred."[40] Because the LARA director had defined a "locality" as a "district" or "definite region," the Court applied *Rovas*.[41] After noting the director's position was consistent with *some* dictionary definitions, the Court observed that "[b]ecause defendants' interpretation does not 'conflict with the Legislature's intent as expressed in the language of the statute'…there are no…'cogent reasons' to overrule it."[42]

Younkin might be viewed as consistent with *Rovas* on first glance: the Court reviewed the statute's text. But, on closer inspection, *Younkin* did not merely consider agency guidance as persuasive. Instead, it deferred to LARA on the reasoning that the agency's decision was not clearly in "conflict with…the language of the statute"—it was one of several permissible readings of the statute.[43] Therefore, "there [were] no…'cogent reasons' to overrule it."[44] In doing so, *Younkin* seemed to mimic *Chevron*, but framed the questions in the inverse. *Chevron* first asks, "Is the statute silent or ambiguous?" and then asks, "Is the agency's interpretation reasonable?"[45] In *Younkin*, the Michigan Supreme Court seemed to ask, "Is the agency's interpretation unreasonable?" and, if not, then, "Does the statute give us a clear reason not to accept it?" (i.e., is it ambiguous?)

Michigan's lower courts have reached similar results, such as in the case of *Andersons Albion Ethanol LLC v. Dep't of Treasury*.[46] Faced with a quagmire about how to apply a statutory formula that yielded a mathematically impossible result, the Court of Appeals cited *Rovas* and, referring to pre-*Rovas* caselaw, noted that it was required to give some level of "deference" to the Treasury's interpretation.[47] Relying on solutions the legislature adopted in other acts to address similar

problems and the general purpose of the act in question, the Court ultimately upheld the Treasury's position because its "interpretation of [the act] was not contrary to statute" and the lower tribunal thus "lacked cogent reasons to overturn it."[48]

Despite *Younkin* and *Andersons Albion Ethanol*, some Court of Appeals opinions have reached opposite conclusions. Relying more on the principles underlying *Rovas* than on the cogent reasons formula, these panels rejected agency guidance in favor of independent statutory review.[49] What lawyers can expect when an agency interpretation is at play in their case—a deferential application of *Rovas* or adherence to its anti-deference principles—thus appears to depend more on the court panel than on a clear principle.

Conclusion

Michigan law is confused about how to treat administrative agency legal interpretations. Though *Rovas* sought to resolve that confusion, the tension between its clear principles and unclear standard has only furthered it. The Michigan Supreme Court should step in once more to decide whether Michigan law demands independent judicial review or simply calls *Chevron* by another name. ■

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The views expressed are those of the author and not necessarily of Clark Hill PLC.

ENDNOTES

1. *Kisor v Wilkie*, 139 S Ct 2400; 204 L Ed 2d 841 (2019).
2. *Auer v Robbins*, 519 US 452; 117 S Ct 905; 137 L Ed 2d 79 (1997).
3. *In re Complaint of Rovas*, 482 Mich 90; 754 NW2d 259 (2008).
4. *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).
5. Larsen, *State Courts in a Federal System*, 69 Case W Res L Rev 525, 530 (2019) (distinguishing *Rovas* from *Chevron*), available at <https://case.edu/law/sites/case.edu.law/files/2019-09/2018%20Sumner%20Canary%20Memorial%20Lecture_%20State%20Courts%20in%20a%20Federal%20Sy.pdf> [https://perma.cc/8C3N-K2FS] (website accessed February 22, 2021).
6. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 Tex Rev Law & Pol 261 (2004) (commenting that "[a] majority of our Michigan Supreme Court is committed to a textualist approach to judicial interpretation").
7. *Rovas*, 482 Mich at 93 (explaining "courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation" and "must respect legislative decisions and interpret statutes according to their plain language.").
8. *Rovas*, 482 Mich at 100–101.
9. *Id.* at 102.
10. *Id.* at 101 and *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 239; 501 NW2d 88 (1993).
11. *Toole v Michigan State Bd of Dentistry*, 306 Mich 527, 535; 11 NW2d 229 (1943).
12. *Clonlara, Inc*, 442 at 239 (referring to "policy statements issued by" an agency that are not promulgated as "interpretive rules").
13. *Rovas*, 482 Mich at 93, 105, 107, 111.
14. *Id.* at 102 (noting that deferential standards "threaten the separation of powers principles discussed earlier by allowing the agency to usurp the judiciary's constitutional authority to construe the law and infringe on the Legislature's lawmaking authority.").
15. *Marbury v Madison*, 5 US 137, 177; 1 Cranch 137 (1803).
16. *Rovas*, 482 Mich at 98 ("Since the time of *Marbury v Madison*, interpreting the law has been one of the defining aspects of judicial power….").
17. *Id.* ("[T]he proper construction of a statute is a judicial function, and we are required to discover the legislative intent.")
18. *Id.* at 102.
19. *Id.* at 103.
20. *Boyer-Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935).
21. *Rovas*, 482 Mich at 103.
22. *Id.*
23. *Id.*
24. *Id.* at 93 (emphasis added).
25. *Chevron*, 467 US at 843–844.
26. *Rovas*, 482 at 111 (rejecting an invitation to adopt *Chevron* because "the unyielding deference…required by *Chevron* conflicts with" case law and "the separation of powers principles discussed above….").
27. *Boyer-Campbell*, 271 Mich at 296.
28. *United States v Moore*, 95 US 760, 763; 24 L Ed 588 (noting "[t]he officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.")
29. *Chevron*, 467 US at 844.
30. *Paye v City of Grosse Pointe*, 279 Mich 254; 271 NW 826 (1937).
31. *Id.* (noting that "while 'the construction given by those charged with the duty of executing it is always entitled to the most respectful consideration'… *such construction is not binding upon the courts.*") [emphasis added].
32. See, e.g., *Magreta v Ambassador Steel Co*, 380 Mich 513, 519–520 (1968); *Lane v Mich Dep't of Corr, Parole Bd*, 383 Mich 50, 55–58 (1970); & *Gusler v Fairview Tibular Prods*, 412 Mich 270, 307–308 (1981).
33. *Rovas*, 482 Mich at 103.
34. *Marbury* 5 US at 177.
35. Const 1963, art 5, §§ 1 & 8.
36. Const 1963, art 3, § 2.
37. See, e.g., *McDougall v Schanz*, 461 Mich 15, 26–27; 597 NW2d 148 (1999) (noting the constitutional basis of the court's exclusive rule-making authority in matters of practice and procedure).
38. *Detroit Base Coalition for Human Rights of the Handicapped v Dept of Social Servs*, 431 Mich 172, 177–178; 428 NW2d 335 (1988).
39. *Younkin v Zimmer*, 497 Mich 7; 857 NW2d 244 (2014).
40. *Id.* at 8.
41. *Id.* at 10.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Chevron*, 467 US at 842–844.
46. *Andersons Albion Ethanol, LLC v Dep't of Treasury*, 317 Mich App 208; 893 NW2d 642 (2016).
47. *Id.* at 214.
48. *Id.* at 217.
49. See, e.g., *Ashley Capital, LLC v Dep't of Treasury*, 314 Mich App 1, 11; 884 NW2d 848 (2015) and *In re Reliability Plans for 2017–2021*, 325 Mich App 207, 221; 926 NW2d 584 (2018), reversed on other grounds at *In re Reliability Plans for 2017–2021*, 505 Mich 97; 949 NW2d 73 (2020).