

Reason and Equilibrium in Veterans Law: A Game-Theoretical Defense of the Standards that Determine the Scope of Claims

Jenny J. Tang*

Introduction

The U.S. Department of Veterans Affairs (“VA”) administers veterans and veterans’ survivors benefits.¹ Prior to the Veterans’ Judicial Review Act of 1988 (“VJRA”),² claimants were precluded from appealing adverse decisions rendered by VA. VA’s administration of veterans’ benefits was governed by sparse veterans law legislation and its own agency interpretations of the same.³ The VJRA completely reinvented the veterans claims adjudication system,⁴ and it implemented two levels of federal judicial review: first, by creating the U.S. Court of Appeals for Veterans Claims (“Veterans Claims Court”),⁵ and second, by allowing the Federal Circuit to have limited jurisdiction over Veterans Claims Court decisions.⁶

* Jenny J. Tang is Associate Counsel at the Board of Veterans’ Appeals, Department of Veteran Affairs. She also serves on the Court of Appeals for Veterans Claims Bar Association’s Board of Governors. She would like to extend her gratitude to James D. Ridgway for his guidance, to Nathan A. Dykas and Steven J. Morra for their game theory insights, and to Eric E. Blowers for his feedback.

¹ There are many different types of veterans benefits. *See generally* Title 38 of the United States Code. This Article focuses on determining the scope of claims for compensation, which often raise components such as issues and theories of entitlement as part and parcel of a claim. This Article does not comment on the scope of claims for other benefits that have objective criteria, such as educational benefits and home loan benefits.

² *See* Pub. L. No. 100-687, 102 Stat. 4105 (1988).

³ *See* James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans Benefits Before Judicial Review*, 3 VETERANS L. REV. 176–219 (2011) [hereinafter Ridgway, *The Splendid Isolation Revisited*].

⁴ *See generally* James D. Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251 (2010) [hereinafter Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later*] (discussing the implementation and effects of VJRA).

⁵ *See* 38 U.S.C. § 7252 (2000); Veterans Programs Enhancement Act, 38 U.S.C. § 7251 (2008) (renaming the court from the Veterans Court to the United States Court of Appeals for Veterans Claims).

⁶ *See* 38 U.S.C. § 7292 (2000) (stating that the Federal Circuit has jurisdiction to review decisions by the Court as to matters of law and as to “any challenge to the validity of any statute or regulation or any interpretation thereof”); *see also* Kalin v. Nicholson, 172 F. App’x 1000, 1002 (Fed. Cir. 2006) (noting that the Federal Circuit cannot “review

Though the new veterans claims adjudication system was intended to be “uniquely pro-claimant,” and non-adversarial, the system has two fundamentally competing but equally pro-claimant interests, and the tension between them has resulted in added complexity and delays in the adjudication process.⁷ These two interests are (1) ensuring informality and a non-adversarial claims system, and (2) ensuring due process and accurate agency decision-making.⁸ Given these two competing interests, this Article uses game theory to explain the development of the veterans law doctrine governing determinations as to the scope of claims and to analyze whether this doctrine adequately supports the institutional goal of creating a veteran-friendly claims adjudication system.⁹

The judicial creation of veterans law by the Veterans Claims Court and the Federal Circuit can be reductively described as a game for purposes of analyzing the doctrine governing the interpretation of the scope of claims. Basically, a game consists of the following elements: a

any ‘challenge to a factual determination’ or any ‘challenge to a law or regulation as applied to the facts of a particular case.’” (quoting 38 U.S.C. § 7292(d)(2)).

⁷ *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (stating that for veterans’s benefits, “the system of awarding compensation is so uniquely pro-claimant”). See, e.g., Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL’Y 303 (2004) (opining that the evolution of the veterans claims adjudication system was driven by two models of administrative benefits: the charity model of government benefits, in which the administration of veterans benefits is a voluntary undertaking and where legal protections such as due process and judicial review are unnecessary and undesirable; and, the social insurance model, in which the administration of veterans benefits is a form of social contract with the government whereby the government uses its taxing and spending powers, thus subjecting the administration of benefits to the protections of the law including due process and independent review); Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later*, *supra* note 4, at 278–87; James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review of the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 118 (2009) [hereinafter Ridgway, *Why So Many Remands*]; Rory R. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans’ Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VETERANS. L. REV. 77, 83–92 (2010).

⁸ See Riley, *supra* note 7, at 78–80.

⁹ See generally, *Brown v. Gardner*, 513 U.S. 115 (1994); see also *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (citing H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794–95); James D. Ridgway, *Toward a Less Adversarial Relationship Between Chevron and Gardner*, U. MASS. L. REV. 388, 393–98 (2014) (discussing the origins of veteran friendliness).

set of players, available actions or strategies, information, and payoffs (or the utility of each player's combinations of actions).¹⁰ These elements, which are “collectively known as the rules of the game[,]” can be used to describe complex social situations and to predict what will happen in those situations.¹¹ The players of a game will try to maximize their payoffs by devising strategies for taking action depending on the information available to each of the players at the time they take their turn.¹²

The players in the game of judicially created veterans law are the two fundamentally competing, but equally pro-claimant, interests of veterans law. The Veterans Claims Court and the Federal Circuit (collectively, “the judiciary”) are instruments of those interests.¹³ The judiciary may serve either interest, depending on the case before it. Thus, the Veterans Claims Court does not aim to attain payoffs only for informality, and the Federal Circuit does not aim to attain payoffs only for due process, or vice versa. The judiciary renders decisions on a case-by-case basis and consequentially develops the law in order to support either interest so that the highest payoffs for these two competing interests are eventually attained. Thus, a pro-claimant veterans claims adjudication system is continually developed and— ideally— improved in favor of the claimant.

¹⁰ See ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 31 (3d ed. 2001). This Article relies on the third edition of the text rather than the most recent fourth edition, but any changes made to the third edition do not impact this Article's analysis. See generally ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY iii (4th ed. 2005) (noting changes to the third edition).

¹¹ RASMUSEN, *supra* note 10, at 31.

¹² See *id.*

¹³ See generally James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1056–69 (2013) [hereinafter Ridgway, *Fresh Eyes on Persistent Issues*] (discussing the roles and responsibilities of the Court and of the Federal Circuit in rendering judicial review).

To explain this metaphorically, imagine the judiciary is a teacher, and the veterans claims adjudication system is a student. The teacher instructs the student from the time he starts kindergarten (i.e., in 1988 when the VJRA was enacted) until he graduates and goes to college. The teacher's ultimate goal is to ensure that the student will write "good" papers in his college-level English literature and creative writing courses. However, the teacher has two competing skills she wishes to teach the student: (1) writing creatively and thinking innovatively, and (2) adhering to proper grammar, spelling, and other formal rules of writing. The student writes essays that can lack creativity and/or violate formal writing rules, either because he was in a hurry and/or because the essay was complex, and the teacher uses each essay as an example in her next lesson. The teacher chooses to emphasize either writing creatively or formal writing rules in that lesson. The game-theorist analyzes these lessons and predicts whether the outcome is such that the student ends up with a balance of creativity and ability to use formal rules so as to write good papers in college.

To predict the outcome¹⁴ of the game, the modeler analyzes the combination of strategies used by the players to optimize payoffs, or in other words, to solve the game.¹⁵ The combination of strategies is known as the equilibrium.¹⁶ If each player's strategies are calculated to attain the highest payoffs possible, then the equilibrium will be optimized, and the game will inevitably reach a "locally" optimal outcome for both players.¹⁷ However, although the nature of each

¹⁴ See RASMUSEN, *supra* note 10, at 34 (showing that the outcome of the game is a set of interesting elements that the modeler picks from the values of actions, payoffs, and other variables after the game is played out; in other words, the modeler chooses what factors are significant at the end of the game).

¹⁵ See *id.* at 31.

¹⁶ See *id.*

¹⁷ Cf. *infra* Part III.C. (discussing the global optimum).

competing interest is meant to be pro-claimant in the veterans benefits context, equilibrium optimization has not necessarily resulted in an outcome that is pro-claimant.

Indeed, though the players in this game act to attain the highest payoffs for both pro-claimant interests, it is apparent that the procedural mechanisms created by the judiciary to attain optimal payoffs result in significant delays in adjudication and much legal complexity.¹⁸ This added complexity of law in turn causes further delays for the claimant in receiving a final decision in the claim due to repeated remand by the Board of Veterans' Appeals ("Board") and by the Veterans Claims Court—a process that some have referred to as the "hamster wheel"¹⁹ or a "procedural whack-a-mole."²⁰ Thus, although the doctrine governing the interpretation as to the scope of claims may well be optimized for both competing interests of veterans law, and the added procedural mechanisms may well be the best possible doctrine given the rules of the game, the current system is inefficient and frustrating for veterans and their survivors.²¹

This Article has a broader motive for arguing that the doctrine governing the determination as to the scope of claims is optimized. Despite the argument that the mechanisms pertaining to the scope of claims are optimized for both competing interests of veterans law, the veterans claims system is still "broken."²² Thus, workaround programs and legislative reform

¹⁸ See Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. MIAMI NAT'L SECURITY & ARMED CONFLICT L. REV. 1, 2 (2015) [hereinafter Allen, *Justice Delayed; Justice Denied*]; see generally Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1040–43.

¹⁹ Allen, *Justice Delayed; Justice Denied*, *supra* note 18, at 12.

²⁰ Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1040.

²¹ See discussion *infra* Part I.A.2.

²² See U.S. DEP'T OF VETERANS AFFAIRS, VETERAN APPEALS EXPERIENCE: LISTENING TO THE VOICES OF VETERANS AND THEIR JOURNEY IN THE APPEALS SYSTEM, CENTER FOR INNOVATION FINDINGS REPORT 5 (2016) [hereinafter VETERAN APPEALS EXPERIENCE].

will serve to cause uncertain payoffs in the game or will serve as a defection in the game.²³ Such reforms will thereby result in an outcome with fewer overall payoffs for the two competing interests of veterans law.²⁴ Ultimately, to echo one commentator, the best possible—and perhaps only—solution to the procedural whack-a-mole is to start over from scratch, with careful planning and input by all stakeholders, in order to achieve the global optimum; that is, a “good” system.²⁵

In Part I, this Article provides the reasons and framework for using game theory to analyze the development of the doctrine governing the determination as to the scope of claims. Part I.A first identifies the goal of establishing a uniquely pro-claimant veterans claims adjudication system and highlights current criticism of the system. Part I.B then explains the two competing, but equally pro-claimant, interests inherent in the system. To support the game-theoretical framework, Part I.C sets out the assumptions that, as instruments of these two competing interests, the Veterans Claims Court and the Federal Circuit are perfectly rational and cooperative, and the judiciary takes action to support these interests using all prior information available to it. Then, Part I.D explains the solution concept of Nash equilibrium with strategy optimization.

Part II provides a play-by-play of the game of judicially developing doctrine governing the scope of claims. Part II.A first explains the role of legislation as a player in the game, and a

²³ See Rajiv Sethi, *Nash Equilibrium*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 541 (2d ed. 2008) (defining a defection as a non-cooperative action by a player in a game).

²⁴ See *id.* at 540–41; see also RASMUSEN, *supra* note 10, at 361 (explaining that Nash characterized cooperative games as fair and efficient, with neat predictions of the outcomes of utility maximization).

²⁵ Allen, *Justice Delayed; Justice Denied*, *supra* note 18, at 19–20; Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future*, 58 CATH. U. L. REV. 361, 365 (2009) [hereinafter Allen, *The United States Court of Appeals for Veterans Claims at Twenty*].

definition of a claim is provided as the first constraint in the game. Part II.B then models the development of the duty to sympathetically read and develop claims to their optimum and the evolution of the normative standards of reasonableness which guide the interpretation of claims. Part II.C also explains the intersection of the development of the doctrine governing the determination as to scope of claims with the doctrine of implicit denial.

In Part III, the game is solved. Part III.A first explains the utility of the adopted standard of reasonableness as a workhorse for both competing interests of veterans. Then, the question of who is the reasonable person in this standard is answered in the context of claims for benefits and in claims for increased benefits. The Article also posits that the same normative definition of the reasonable person is utilized in the implicit denial doctrine. Part III.B then suggests strategies to tie up loose ends in the game in order to progress further toward a local optimum. Finally, after providing an overview of the game's outcome and consequences thereof, Part III.C proposes that the game be abandoned in favor of reinventing the system from scratch with careful planning and the aim of achieving a global optimum.

I. Creating Veterans Law: A Game of Pro-Claimant Payoffs, Rational Players, and Perfect Information

The inter-disciplinary application of game theory to law is not new.²⁶ Game theory has long been used to explain social phenomena in the social sciences because the game can “reduce the basic elements of complicated social and economic interactions to forms that resemble parlor games.”²⁷ Theorists have applied game theory to jurisprudence in everything from tort law,²⁸

²⁶ See Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1294 (1990) (book review of ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989), stating “[t]he law abounds with instances in which small numbers of players who have private information adopt strategies to further their well-defined interests, and in which the substantive and procedural legal rules specify to a highly detailed degree the ‘the rules of the game.’”).

²⁷ DOUGLAS G. BAIRD, ROBERT H. GERTNER, & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 7 (1994).

contract law,²⁹ civil procedure and litigation,³⁰ plea bargaining,³¹ and, most commonly, to the interplay of law and economics.³² Such applications of game theory, however, have been criticized as “the premier fashionable tool of microtheorists.”³³ In particular, game theory has been applied to law in increasingly complex social situations that do not adhere to quick assumptions (e.g., full cooperation, rationality, and complete information disclosure).³⁴ Furthermore, such applications can give way to individual decision-making.³⁵ Lastly, the framework of the Prisoners’ Dilemma is an obsession for legal scholars, who then shoehorn situations into this framework while ignoring other types of games.³⁶

However, given the game refinements discussed in this Article, particularly the robust assumption that the judiciary is rational and cooperative and will seek to attain all information available when rendering its decisions, the use of game theory as a modeling tool applies more

²⁸ See, e.g., John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973); see also BAIRD ET AL., *supra* note 27, at 24.

²⁹ See, e.g., Avery W. Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 216 (1990); see also BAIRD ET AL., *supra* note 27, at 74–75.

³⁰ See, e.g., Lucian A. Bebchuk, *Litigation and Settlement under Imperfect Information*, 15 RAND J. ECON. 404 (1984); Lucian A. Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988).

³¹ See, e.g., Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988).

³² See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (4th ed. 1992).

³³ Franklin M. Fisher, *Games Economists Play: A Noncooperative View*, 20 RAND J. ECON. 113, 113 (1989).

³⁴ See, e.g., Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541, 1541 (1998). This article assumes that the game of judicially developing doctrine is one that includes rationale and cooperative players, and that each player can attain all the available information in the game during each turn. See discussion *infra* Part I.B.

³⁵ See Randal C. Picker, *Law and Economics: Intellectual Arbitrage*, 27 LOY. L.A. L. REV. 127, 129 (1993).

³⁶ See Ayres, *supra* note 26, at 1291–95 (1990) (“Law review articles continue to be mindlessly mired in the game theory ‘technology’ of the fifties. Countless articles rearticulate the Prisoner’s Dilemma, but few even proceed to other bi-matrix games.”); see also BAIRD ET AL., *supra* note 27, at 1; Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, in PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES 241, 2 (2008).

smoothly to the judicial development of veterans law than to complex socio-economic situations or adversarial legal interactions.³⁷ Still, this Article's use of game theory to describe and predict the outcome of a judicially developed area of veterans law is meant to be a modeling tool, and not a perfect mathematical proof.³⁸

It should be noted that unlike models of socio-economic interactions, there is no mathematical reasoning employed in this game's model.³⁹ Instead, this modeler employs a literary method to explain the game. To mitigate the possibility of readers attributing counterintuitive results to bad assumptions, this section sets out the axiomatic assumptions of the game: the pro-claimant nature of both competing interests of veterans law, the rational and cooperative nature of the instruments of those two interests, and the egalitarian nature of the game's perfect information set.

A. Reasonableness in the Administration of Veterans Law Benefits

Because this Article uses game-theoretical models to describe actions based on assumptions of rationality and commitment to maximize pro-claimant utility, theories regarding individual decision-making, shared public values, and theories of morality and the common good regarding what is objectively reasonable do not apply. For purposes of the game of developing veterans law doctrine governing the scope of claims, the concept of what is reasonable is described in two contexts: (1) to define the nature and measurable quality of the game's

³⁷ See generally McAdams, *Beyond the Prisoners' Dilemma*, *supra* note 36 (discussing the difficulties of applying game theory to games of asymmetrical imperfect information, of frequently changing beliefs regarding competing players, and of noncooperation).

³⁸ See RASMUSEN, *supra* note 10, at 31.

³⁹ See generally *id.* at 23–24 (discussing the need for a balance between the over-use of mathematical technique in economic game modeling and the total renouncement of mathematical reasoning in favor of literary method that conceals fallacious arguments).

payoffs,⁴⁰ and (2) to normatively define what the standards are for determining the scope of claims.⁴¹ Thus, this Article uses the notion of reasonableness in two distinct ways: first, as a narrow philosophical notion of reason within the institution of the current veterans benefits system; and second, as a normative conceptualization of reasonableness as a standard for purposes of judicial review and providing guidance to agency decision-makers.

1. The Overarching Goal of Maintaining a Pro-Claimant Claims System

An underlying consideration for any social endeavor is whether the individuals involved are attempting to attain reasonable goals or to support reasonable interests. In philosophy, the reasonable goals may be, for example, wholly self-interested or may be for the good of the many.⁴² The notion of reasonableness is utilized in veterans law, like many other areas of law.⁴³ As one legal scholar has noted, given the many ways in which the concept of “reasonableness” is used in law, and given the vagueness of the concept itself, it is difficult to form a comprehensive and general analysis of what “reasonableness” is in jurisprudence.⁴⁴ Similarly, a comprehensive discussion of whether the administration of veterans benefits is in and of itself reasonable would likely require consideration of huge bodies of philosophy regarding such matters as universal moral values, western socio-political history, *jus post bellum*, or modern ideas of what it means to be a hero.

⁴⁰ See *infra*, at Part I.A.1.

⁴¹ See *infra*, at Part II.

⁴² See generally *Egoism*, Internet Encyclopedia of Philosophy, <http://www.iep.utm.edu/egoism/> (discussing the goal of philosophy, which can be self-interested or for the common good depending on the theory).

⁴³ See, e.g., 38 C.F.R. § 3.156(a) (2015) (stating that a standard of reasonableness is used to determine whether material evidence has been submitted to reopen a previously denied claim).

⁴⁴ See Benjamin Zipursky, *Reasonableness In and Out of Negligence Law*, 163 U. PA. L. REV. 2131, 2133 (2015) (choosing to analyze the concept of reasonableness specifically in negligence law).

However, for purposes of this Article, there is no objective standard or moral norm that defines what is reasonable. This Article’s analysis of what is reasonable as applied to the current veterans claims adjudication system is focused, simplified, and analogous to John Rawls’ suggested conceptualization of justice as fairness and fairness as reason, as such concepts stand within specific U.S. socio-political institutions.⁴⁵ Rawls does not define justice using general moral concepts such as utilitarianism.⁴⁶ Indeed, Rawls argues that no such general moral concept can be the basis for a concept of justice in a modern democratic state, given that such a state has a diversity of viewpoints, doctrines, and conceptions of the common good.⁴⁷ Rawls concedes that political philosophy is rife with controversy regarding certain fundamental moral questions that cannot be fully settled, and he suggests that framing socio-political institutions such that these questions do not arise allows for “political cooperation on a basis of mutual respect.”⁴⁸ Rawls opines that dialogue pertaining to the conception of what is objectively reasonable can only succeed through a narrow and focused lens in which any ideas of the reasonable or the common good are purely instrumental for a given institution.⁴⁹

Accordingly, this Article does not attempt to find a shared basis within public political culture or to analyze a concept of reason within veterans law that aligns with any one fixed concept of justice. By conceptualizing what is reasonable through the narrow lens of what the

⁴⁵ See John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHILOSOPHY AND PUBLIC AFFAIRS 223, 223–24 (1985) (explaining Rawls’ idea of justice as fairness, providing contemporary theorists with the foundations for modern socio-political dialogue about what is “reasonable” on a society-wide scale; and though many philosophical canons make arguments about the nature of man, Rawls narrows the scope of discourse to a concept of justice in a constitutional democracy and within a democracy’s established institutions).

⁴⁶ See *id.* at 225.

⁴⁷ See *id.*

⁴⁸ *Id.* at 226.

⁴⁹ See *id.* at 230; JOHN RAWLS, POLITICAL LIBERALISM 173 (1993); see also JOHN RAWLS, THEORY OF JUSTICE 560–64 (1971) (discussing the lens through which to define the good of “Kantian Constructivism”).

values and concepts of justice are within the institution of veterans benefits administration, this Article posits that the VJRA clearly prescribes what is deemed reasonable in veterans law.⁵⁰ Pursuant to the VJRA, what is objectively reasonable is the creation, development, and implementation of a veterans claims adjudication system that is “uniquely pro-claimant” and non-adversarial.⁵¹ Conversely, any legislation, rulemaking, or policy that is not pro-claimant is unreasonable within this institution.⁵²

In other words, by striving to create a fair, just, and reasonable veterans claims adjudication system, lawmaking players in this game strive for an outcome that is “pro-claimant.” Accordingly, unlike game theoretical models of social situations such as the interactions between plaintiffs and defendants in a civil litigation battle, the payoffs in the game of judicially developing veterans law are not measured in dollar amounts or similarly objective units. The utility, or payoff, realized from playing the game is measured qualitatively in terms of the extent to which the outcome of the players’ combination of strategies is “pro-claimant.”

2. A Pro-Claimant System with Apparent Inefficiencies

Given that the VJRA intends the veterans claims adjudication system to be “uniquely pro-claimant” and non-adversarial, but also to include two levels of judicial review,⁵³ one would expect that the mechanisms that the judiciary has put in place to support the two competing but equally reasonable interests of veterans law would result in a pro-claimant veterans claims

⁵⁰ A discussion of the precedent upon which the VJRA was created is outside the scope of this Article, but can be found in many scholarly writings. *See, e.g.,* Ridgway, *The Splendid Isolation Revisited*, *supra* note 3, at 136.

⁵¹ *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (discussing H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794–95).

⁵² *But see* Zipursky, *supra* note 44, at 2136 (pointing out that, though it seems obvious that what is unreasonable is simply the opposite of what is reasonable, it is not necessarily clear whether it makes a difference whether a legal standard is expressed in terms of what is reasonable versus what is unreasonable).

⁵³ *Hodge*, 155 F.3d at 1362–63.

adjudication system.⁵⁴ However, although the judiciary “has worked diligently to bring order, predictability and transparency to the system,”⁵⁵ the system has long been subject to criticism.⁵⁶ For example, the claims system has become extremely complex and difficult to navigate for claimants and veterans claims adjudicators.⁵⁷ Further, complex rules have made it harder for agency decisions to withstand appellate review.⁵⁸ These qualities, among other factors, have resulted in delays for the veteran to receive a final decision in his claim.⁵⁹

Based on data and claimant interviews, a January 2016 VA report regarding the veterans’ experience in the appeals process concluded that “the system is broken.”⁶⁰ The report noted that there are 440,000 veterans who have appeals pending, 80,000 who have appeals older than five years, 5,000 who have appeals older than ten years, and that it takes five years to resolve a typical appeal.⁶¹ The report also noted that there is no limit to the number of steps the process

⁵⁴ It seems common sense that if you have one pro-claimant apple, and another pro-claimant apple, and you add them together, you will get more pro-claimant apples. However, the nature of the payoffs is qualitative, and not quantitative, and therefore cannot be mathematically combined.

⁵⁵ Allen, *The United States Court of Appeals for Veterans Claims at Twenty*, *supra* note 25, at 372.

⁵⁶ *See generally, id.* at 377–87.

⁵⁷ *See* Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1050–53; *see also* Allen, *Justice Delayed; Justice Denied*, *supra* note 18, at 18–19.

⁵⁸ *See id.*

⁵⁹ There is much available scholarship and investigative reports regarding delays in adjudication in the claims and appeals process. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-453T, VETERANS’ DISABILITY BENEFITS: CHALLENGES TO TIMELY PROCESSING PERSIST 2, 9 (2013); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-89, TIMELY PROCESSING REMAINS A DAUNTING CHALLENGE 1, 16–19 (2012); Allen, *Justice Delayed; Justice Denied*, *supra* note 18, at 12–14; Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1039–45; Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later*, *supra* note 4, at 268–71; Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal about the U.S. Court of Appeals for Veterans Claims and The U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J. L. REFORM 483, 528 (2007) [hereinafter Allen, *Significant Developments*]; Ridgway, *Why So Many Remands*, *supra* note 7, at 144–45 (providing a comprehensive discussion regarding remands by the Court).

⁶⁰ VETERAN APPEALS EXPERIENCE, *supra* note 22, at 5.

⁶¹ *See id.*

could require and that the process can restart an unlimited number of times.⁶² The report compared the appeals process today with the appeals process in 1962 and observed that as new rules have increased system complexity, appellate processing time has tripled.⁶³ The report concluded that although the system was created to be non-adversarial, includes a duty to assist, and allows an open record during the process, veterans themselves feel that the system is adversarial, labor-intensive, and an endless churn with no final decision in sight.⁶⁴

This report reflects claimants' frustration with the endless churn and recurrent delays in receiving a final decision in their claim. Such delays are due in great part to the Board's repeated remands of claims to the VA Regional Offices ("ROs") for further development and the Veterans Claims Court's repeated remands of claims back to the Board after the Board has rendered a decision.⁶⁵ The interest of informality inherent in the system, which is exemplified by a duty to sympathetically interpret and develop claims to their optimum, significantly contributes to this hamster wheel.⁶⁶ It is from this duty that the doctrine governing the determination as to the scope of claims is derived.⁶⁷

⁶² See *id.* See also *Get the Fastest Claim Decision: File a Fully Developed Claim*, VANTAGE POINT: OFFICIAL BLOG OF THE U.S. DEP'T OF VETERAN'S AFFAIRS (June 18, 2013, 5:48 PM), <http://www.macworld.co.uk/how-to/mac/how-take-screenshot-screen-capture-grab-mac-print-3448249/> (stating that there is no limit to the number of times a claim may be filed).

⁶³ See VETERAN APPEALS EXPERIENCE, *supra* note 22, at 6.

⁶⁴ See *id.* at 7–8.

⁶⁵ See Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1040 (stating that "[v]eterans' advocates use the courts to create new procedural requirements, which they then sue to generate large quantities of remands from the courts to VA, with the hope that on remand, additional evidence can change the outcome. In the meantime, representatives advance more new procedural arguments in preparation for the day when remands based upon the prior issues dry up. Thus, the cycle repeats itself."); see also Allen, *Justice Delayed; Justice Denied*, *supra* note 18, at 10–13; Ridgway, *Why So Many Remands*, *supra* note 7, at 113–14.

⁶⁶ See Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1043.

⁶⁷ See discussion *infra* Part II.

Accordingly, it seems apparent that this doctrine actually attains inadequate payoffs for the two pro-claimant interests of informality and due process, and that the system on the whole fails to be just, fair, or reasonable. On the other hand, because the players serve two equally pro-claimant interests, the outcome of the game must have some pro-claimant utility, and the game is precluded from being *not* pro-claimant.⁶⁸ This Article posits that despite the system's apparent inefficiencies, the nature of the game is such that the judiciary is developing the best possible doctrine to attain the highest possible payoffs for the two competing interests of veterans law.

B. The Players: Fundamentally Competing Interests and Their Rational Instruments

In a game, the players are individuals (or groups that take collective action) who make decisions. The player's goal is to maximize his payoffs, or utility, by choosing to take certain actions.⁶⁹ A major argument against applying game theory to model complex social interactions is that game theoretical solution concepts do not attempt to model the individual's decision-making process.⁷⁰ Decision theory, as opposed to game theory, would be more appropriately applied to analyzing how one individual person makes a decision when he or she is faced with uncertainty, or when that person will not interact strategically with other decision makers, or when that person will make his or her decision without regard to impact on utility payoffs.⁷¹

⁶⁸ The only way that the game could end up with no pro-claimant utility at all is if the game is a zero sum. *See* RASMUSEN, *supra* note 10, at 49 (defining a zero-sum game as one in which the sum of all players' interests is zero regardless of the strategies they choose). However, given that this game has qualitative interests with payoffs that cannot be objectively and measurably added together, the game is precluded from being zero-sum.

⁶⁹ *See id.* at 32.

⁷⁰ *See, e.g.,* BAIRD ET AL., *supra* note 27, at 124.

⁷¹ *See* RASMUSEN, *supra* note 10, at 21.

Indeed, using a game theory model depends on the assumption that the individual players will behave completely rational in order to attain maximum payoffs.⁷² Given the assumption that the instrumental players of the game are committed to creating a pro-claimant veterans claims adjudication system and are bound by the game's rules, using game theory to model the judicial creation of veterans law works relatively well. Because the Veterans Claims Court and the Federal Circuit serve as instruments of the two competing and equally pro-claimant interests of veterans law, the model is based on robust assumptions that the players are rational and cooperative.

1. The Two Competing, But Equally Pro-Claimant, Interests of Veterans Law

The VJRA's intent to create a uniquely pro-claimant system while also instigating two levels of judicial review resulted in a new claims system ingrained with two fundamentally competing, but equally pro-claimant, interests.⁷³ First, the system intends to be informal and non-adversarial.⁷⁴ Second, the system, with its implementation of two levels of judicial review, intends to ensure that claimants are afforded due process and that VA decisions are accurate and "right."⁷⁵ Champions of each of these interests have the ultimate goal of creating a veterans claims adjudication system that is uniquely pro-claimant.

Since the VJRA was passed, the Veterans Claims Court has created a field of law with only sparse legislation with which to start.⁷⁶ The Federal Circuit has overseen the Veterans Claims Court's legal judgments and has therefore also played a part in the development of

⁷² See CHARALAMBOS D. ALIPRANTIS & SUBIR K. CHAKRABARTI, GAMES AND DECISION MAKING 1 (1998).

⁷³ See *supra* text accompanying note 7.

⁷⁴ See *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

⁷⁵ Ridgway, *The Veterans' Judicial Review Act Twenty Years Later*, *supra* note 4, at 295.

⁷⁶ See Allen, *The United States Court of Appeals for Veterans Claims at Twenty*, *supra* note 25, at 372.

veterans law.⁷⁷ The Veterans Claims Court's and the Federal Circuit's decisions have attempted to create a system that is pro-claimant and that upholds the two competing interests of veterans law because the VJRA prescribed these interests and the members of the judiciary have vowed to uphold the law. Because rationality is the instrument of reason,⁷⁸ and the VJRA provides that pro-claimant interests are reasonable, it is assumed that the members of the Veterans Claims Court and of the Federal Circuit are instruments of the two competing, but equally pro-claimant, interests of veterans law.

2. Assuming the Veterans Claims Court and the Federal Circuit are Rational and Cooperative

Although critics of the application of game theory to social interactions cite decision-making theory as support against the assumption that players are rational,⁷⁹ in the case of judicial lawmaking, the Veterans Claims Court and the Federal Circuit are ideal rational players. Individuals who have undertaken to serve on the Veterans Claims Court or Federal Circuit have vowed to uphold the law and have chosen to cooperate with prescribed rules of law to make judicial decisions in this system. Therefore, the assumption of these players' rationality cannot be undermined by factors that are discussed extensively in decision-making theory and the theory of choice.⁸⁰

⁷⁷ See Allen, *Significant Developments*, *supra* note 59, at 492.

⁷⁸ See *Instrumental Rationality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/rationality-instrumental> (2013).

⁷⁹ See, e.g., BAIRD ET AL., *supra* note 27, at 124.

⁸⁰ See generally RASMUSEN, *supra* note 10, at 31.

Though judges are certainly capable of devising their own conceptions of the common good and of acting in their own self-interest,⁸¹ judges serve only the interests of administering veterans benefits. Furthermore, judges have an agreement, like a social contract, with the legal institution in which coercion, deception, and fraud are excluded from their decision-making.⁸² Additionally, judges decide cases in order to serve the interests of veterans law and must be unaffected by their personal socio-political, historical, and moral tendencies and presumptions. This assumption is further bolstered by the fact that each judge is appointed to the Veterans Claims Court with no prior knowledge of veterans law⁸³ and that periodically, new judges will become a member on the Veterans Claims Court or on the Federal Circuit and will inevitably try new strategies.⁸⁴

Given the axiomatic assumption that the Veterans Claims Court and the Federal Circuit will adhere to constraints of the game, specifically that their decisions are based on legal precedent, the game of judicially developing veterans law is generally a game of cooperation.⁸⁵ It follows that game of judicially developing doctrine governing the scope of claims is also a game of cooperation.⁸⁶

⁸¹ See Rawls, *supra* note 45, at 233–34.

⁸² See *id.* at 235.

⁸³ See Ridgway, *The Veterans' Judicial Review Act Twenty Years Later*, *supra* note 4, at 271.

⁸⁴ See generally Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1039 (noting that three relatively judges are on the Federal Circuit).

⁸⁵ See RASMUSEN, *supra* note 10, at 44 (defining a cooperative game as one in which the players make binding commitments).

⁸⁶ See *id.* (explaining that cooperative game theory is based on axioms of fairness and equity, and it provides solution concepts that are based on players maximizing their own utility functions subject to stated constraints).

As discussed in the Introduction, the Veterans Claims Court and the Federal Circuit do not, as a rule, strive to attain payoffs of one interest over the other.⁸⁷ The two interests of veterans law are in essence the competing players, and the members of the Bench are the rational instruments of those interests.⁸⁸ Therefore, the judiciary may aim to serve the interest of maintaining an informal claims system in one case, but then serve the interest of ensuring VA decision-making accuracy in another case. Regardless of which interest is supported in a given case, that interest will not have an advantage by virtue of having more information because all the information up to the point of the decision-making is available to both players. The egalitarian nature of the available information set is discussed below.

Furthermore, whether the judiciary renders panel, *en banc*, or single-judge decisions would not make a difference, given that individual decision-making is not a factor.⁸⁹ In other words, even if the judiciary were to render legal judgments based on discussion as a group, the player—whether group or individual—would still be an instrument of one interest or the other, and purported advantages of group decision-making⁹⁰ would not result in greater eventual payoffs in the game for either competing interest in the context of this Article’s game theory model.

⁸⁷ See *infra* Introduction.

⁸⁸ To put this yet another way, in the game of developing veterans law, the chess board is the entire body of veterans law, the players sitting at the chess board are the two abstract competing pro-claimant interests of veterans law, and the Court and the Federal Circuit (and the lawmaking powers provided to each) embody all the chess pieces.

⁸⁹ Thus, current scholarship regarding the merits of the Veterans Claims Court publishing precedential opinions, as opposed to rendering unpublished single-judge decisions, does not factor into this game-theoretical model of judicially developed doctrine. A discussion of the advantages of the Veterans Claims Court rendering *en banc* and panel decisions over single-judge decisions is outside the scope of this Article. Such a discussion may be found in James D. Ridgway, Barton F. Stichman, & Rory E. Riley, “*Not Reasonably Debatable*”; *The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POLY’Y REV (forthcoming); Allen, *Significant Developments*, *supra* note 59, at 521–22.

⁹⁰ See *id.*

C. The Perfect, But Incomplete, Information Game

Another major argument against using game theoretical solution concepts is that in many social interactions, at least one player is not perfectly informed, or even chooses not to seek the available information.⁹¹ However, the Veterans Claims Court and the Federal Circuit have excellent information resources.⁹² All information is publically available to them, and they seek and collect all available information to predicate their decisions on precedent. It can also be assumed that more than one player does not take action simultaneously, given that the Veterans Claims Court and the Federal Circuit decide one by one in docket order.⁹³ Further, as noted above, as a rational player, the judiciary will use the combination of strategies that will result in the highest payoff. This makes for an axiomatically sequential game⁹⁴ of perfect information.⁹⁵

Given these axiomatic assumptions that the players are perfectly rational and each will always have perfect information on their turn, the game of judicially developing veterans law is uniquely cooperative. There is no negotiation or bargaining, no private (or non-verifiable) information,⁹⁶ and no withholding of information to gain a strategic advantage, thus precluding

⁹¹ See BAIRD ET AL., *supra* note 27, at 125.

⁹² *E.g.*, law libraries, Westlaw, Lexis, and, not least of all, very capable attorney law clerks.

⁹³ That is not to say that a court will decide a case regarding one topic and the immediately following case will be decided regarding that same topic. Indeed, actions in a sequential game can occur years apart, so long as the actions follow the prior action taken within the same game.

⁹⁴ See RASMUSEN, *supra* note 10, at 115 (explaining that a game is sequential when moves by more than one player are made in sequence and there are no simultaneous moves by players).

⁹⁵ See *id.* at 122 (explaining that a perfect information game is a sequential game in which each player knows the full history of all the actions taken prior to the time the players have to take a turn); see also BAIRD ET AL., *supra* note 27, at 312. Given this, and because appellate courts are not making initial findings of fact that depend on updated information, the question of whether members of the Court and Federal Circuit are Bayesian is not relevant in this article's game. For comparison, see RICHARD A. POSNER, *HOW JUDGES THINK* (2010).

⁹⁶ See RASMUSEN, *supra* note 10, at 86 (discussing private information and strategic advantage in an asymmetric information game).

any higher payoffs.⁹⁷ Indeed, the information set at each player's turn is equally available and sought after by all players in the game, making this a game of symmetric information.⁹⁸

However, due to the fact that neither player knows precisely what payoff will result when employing a given strategy (in part because the qualitative payoffs cannot be measured and in part because the game itself is “uncertain”⁹⁹), this is a game of incomplete information as well as perfect information.¹⁰⁰ Indeed, unlike the application of game theory to law and economics, it is not possible to quantify the probability of payoffs for any given combination of strategies using an arbitrary dollar unit. Nor can such payoffs in the past be reduced to any numerical value, given that payoffs are measured qualitatively in terms of the extent to which the outcome of each players' combination of strategies is “pro-claimant.”¹⁰¹ For example, it would be inadequate to quantify the probability utilities of any given combination of strategies by simply looking at data of claims granted by VA when adjudicating claims after the adoption of the duty to sympathetically read claims.¹⁰² However, even when modeling an incomplete information game, the modeler can arrive at a predicted outcome, albeit in qualitative terms, given the cooperative nature of the strategies employed by the players.

D. Using Nash Equilibrium as a Solution Concept

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *See infra* Part II.A.

¹⁰⁰ *See* RASMUSEN, *supra* note 10, at 88–89; *see also* BAIRD ET AL., *supra* note 27, at 312. Because the game analyzed in this Article is not one of complete information, and because this game does not have readily apparent dominant strategies (which is a player's strictly best response to *any* strategies the other players might pick), the Article does not use the solution concept of dominant strategy equilibrium. *See* RASMUSEN, *supra* note 10, at 42.

¹⁰¹ *See supra* Part I.A.

¹⁰² *See infra* Part II (discussing the adoption of the duty to sympathetically read claims, which is an informal rule for determining the scope of claims).

The available actions are any lawmaking powers that the judiciary may have, pursuant to the extent of the judiciary’s jurisdiction over a given case. Accordingly, the available actions in this game can vary broadly, and certain moves can result in multiple equilibria.¹⁰³ Given the axiomatic assumptions of equally pro-claimant, competing interests, the cooperation and rationality of the players, and the egalitarian nature of information available at each move, the game’s outcome depends in greater part on the actual strategies, or actions, performed by each player in the game.¹⁰⁴

To model the game of developing judicial doctrine governing the scope of claims, this Article uses the extensive form game as the formal structure for solving the game of judicially created veterans law.¹⁰⁵ The extensive form game contains the following elements: (1) the players; (2) the players’ actions or “turns”; (3) the choices available to each player when taking an action; (4) the available information to each player about the prior actions taken by that player and by others in the game when taking an action; and (5) the payoffs to each player that result from each possible combination of actions.¹⁰⁶ The extensive form game explicitly takes into account the actions that each player takes, the sequence of actions, and the information available to each player and includes information regarding all prior actions taken.¹⁰⁷

¹⁰³ See BAIRD ET AL., *supra* note 27, at 39–40 (discussing multiple equilibria resulting from mixed-strategy games).

¹⁰⁴ See *id.* at 46.

¹⁰⁵ Cf. *id.* at 6–15 (discussing the normal form game (also referred to as a “strategic form” game), the basic tool of game theory, which uses the elements of players, available strategies, and the payoff for each possible combination of available strategies).

¹⁰⁶ RASMUSEN, *supra* note 10, at 31; BAIRD ET AL., *supra* note 27, at 31.

¹⁰⁷ See ALIPRANTIS & CHAKRABARTI, *supra* note 72, at 127; see also BAIRD ET AL., *supra* note 27, at 50.

This Article uses the solution concept of Nash equilibrium¹⁰⁸ to predict the game's outcome of judicial doctrine governing the scope of claims.¹⁰⁹ The solution concept of Nash equilibrium reflects the perfect information, sequential rationality nature of this game,¹¹⁰ and defines the equilibria based on all possible actions and their payoff functions.¹¹¹ Nash's rule provides that "[t]he combination of strategies that players are likely to choose is one in which no player could do better by choosing a different strategy given the strategy the other chooses. The strategy of each player must be a best response to the strategies of the other."¹¹²

Notably, Nash equilibrium does not identify a unique solution to the game.¹¹³ Therefore, a solution arising from Nash equilibrium is only a local solution—a prediction of the outcome of the game arising from the game's unique circumstances.¹¹⁴ Furthermore, when there are multiple Nash equilibria in a game, the outcome of the game is not guaranteed to be a Nash equilibrium.¹¹⁵ For example, a player may choose to “adopt a strategy that is part of a different Nash equilibrium, and the combination of [this player's] strategies might not be Nash.”¹¹⁶ Thus,

¹⁰⁸ See John F. Nash, *Equilibrium Points in N-Person Games*, 1 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 48 (1950).

¹⁰⁹ See Sethi, *supra* note 23, at 540 (showing that Nash equilibrium is a fundamental concept in game theory and is widely used as method of predicting outcomes of strategic interaction in the social sciences).

¹¹⁰ See ALIPRANTIS & CHAKRABARTI, *supra* note 72, at 128 (showing that the sequential and perfect information nature of this game makes the game Nash).

¹¹¹ See RASMUSEN, *supra* note 10, at 31, 40 (explaining that the combination of strategies used by the players in the game is known as the *equilibrium*).

¹¹² BAIRD ET AL., *supra* note 27, at 21.

¹¹³ See *id.* at 22.

¹¹⁴ See *id.* at 22–23.

¹¹⁵ See *id.*

¹¹⁶ *Id.* See also *infra* Part II.C. (discussing how, arguably, this is the case with the equilibrium of the judicially developed doctrine of implicit denial).

careful analysis of a game's play-by-play is required to determine whether a game's given combination of actions is "Nash," and therefore capable of utilization as a solution concept.

Nash showed that in every game in which the set of available actions is finite given the constraints of the game, there is at least one mixed-strategy equilibrium.¹¹⁷ Because the game of developing judicial doctrine governing the scope of claims is one of incomplete information (i.e., the players do not know the expected payoffs of their strategies), the equilibrium thereof cannot be modeled such that each player's possible strategies can be mathematically calculated to one action that produces a 100 percent probability for the highest payoffs.¹¹⁸ In other words, the modeler in this game cannot predict that a given player's possible actions include one action that will provide for 100 percent payoffs, and the other action will provide for 0 percent payoffs. For this reason, the players' profiles must be mixed-strategy.¹¹⁹ A mixed-strategy equilibrium cannot be modeled such that each player's choice of actions is binary, but instead, all potential actions have certain probabilities of increased payoffs.¹²⁰

To solve this mixed-strategy game with Nash equilibrium, it is important to note the condition that every strategy will be Pareto-optimal, which means that it is not possible for one player to attain payoffs while leaving the other player at least as well off as before.¹²¹ In other words, any action taken by one rational player who is aiming to further his or her interest will

¹¹⁷ See Sethi, *supra* note 23, at 541.

¹¹⁸ Thus, the game is not a pure-strategy game. See RASMUSEN, *supra* note 10, at 108; see also Sethi, *supra* note 23, at 540; ALIPRANTIS & CHAKRABARTI, *supra* note 72, at 172.

¹¹⁹ See Sethi, *supra* note 23, at 540 (defining an action profile as simply a list of actions for each player).

¹²⁰ See RASMUSEN, *supra* note 10, at 108–09.

¹²¹ See ALIPRANTIS & CHAKRABARTI, *supra* note 72, at 238.

inevitably hurt the other player's payoffs.¹²² In the game of developing judicial doctrine governing the scope of claims, where the two competing players are the interests of ensuring informality and of ensuring due process by way of procedural mechanisms, it is not possible for the judiciary to attain due process payoffs without detracting from the system's informality, and vice versa.¹²³ Still, as discussed above, the judiciary is presumably rational and will therefore take the action that will attain the highest payoffs for whichever interest it supports on a case-by-case basis.¹²⁴ Therefore, the Nash equilibrium in this game is Pareto-optimal.

In a Nash equilibrium where every strategy is Pareto-optimized, the solution to the game is Pareto-optimal because there is no other combination of strategies in which one of the players is better off and the other players are no worse off.¹²⁵ These specific conditions and assumptions allow the modeler to conclude that the game's outcome, the judicial standards governing the scope of claims, is locally optimal.

II. A Nash Equilibrium: The Duty To Sympathetically Read Claims And The Creation Of Standards Of Reasonableness

This Article posits that although the legal canon pertaining to the determination as to the scope of claims encompasses procedurally complex mechanisms and significantly contributes to delays in claims processing,¹²⁶ the doctrine is comprised of procedural mechanisms that are the best possible rules given the circumstances.¹²⁷ This is because the players are rational and

¹²² *See id.*

¹²³ *See* Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1041–43.

¹²⁴ *See supra* Part I.B.2.

¹²⁵ *See* BAIRD ET AL., *supra* note 27, at 311.

¹²⁶ *See* Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1040–45.

¹²⁷ *See id.*

cooperative, the information set is perfect, the equilibrium is “Nash,” and the players’ strategies are Pareto-optimized for the highest payoffs.

This Part provides a play-by-play of the game of the judicial doctrine governing the determination as to the scope of claims. First, it discusses the role of legislation as a player in the game and provides a definition of a claim. It then models the development of the duty to sympathetically read and develop claims to their optimum and the evolution of the normative standard of reasonableness, which guide the interpretation of claims. Lastly, this section explains the intersection of the development of this standard of reasonableness with the development of the doctrine of implicit denial, which pertains to claims (or issues that are part and parcel of a claim) that were not expressly addressed in an unfavorable VA decision, but may have been implicitly adjudicated in that decision.

As noted above, a game can have multiple equilibria.¹²⁸ It is less simple to predict the strategies that players will adopt and to solve a game of multiple equilibria.¹²⁹ For purposes of this Article, the focal point—or the dominant equilibrium¹³⁰—is the equilibrium of strategies that normatively define the standard of reasonableness for purposes of determining the scope of pending claims. In determining the reasonable person in this standard, this Article models only the dominant Nash equilibrium, rather than the equilibrium showing the development of the doctrine of implicit denial.¹³¹

A. Legislation as Nature

¹²⁸ See *supra* Part I.D.

¹²⁹ See BAIRD ET AL., *supra* note 27, at 39.

¹³⁰ See *id.*

¹³¹ A game theoretical model of the doctrine of implicit denial is therefore outside the scope of this Article. However, a discussion of the genesis of the doctrine can be found in John Fussell & Jonathan Hager, *The Evolution of the Pending Claim Doctrine*, 2 VETERANS L. REV. 145 (2010).

Because the game of developing the judicial doctrine governing the scope of claims is one of incomplete information, Nature makes the first move.¹³² For example, in the game of poker, “Nature” can be understood as the shuffling and dealing of cards. In football, Nature is the starting coin toss. For purposes of modeling the judicial development of veterans law, legislation is Nature.¹³³ Nature is a pseudo-player in that its actions are taken in a purely mechanical way.¹³⁴ Nature may begin a game, and it can also move after any player’s move, which creates a game of uncertainty.¹³⁵

The biggest caveat to modeling even the most axiomatically cooperative game with optimized strategies is that Nature may interrupt equilibrium or change the rules of the game.¹³⁶ Because legislation may be passed at any point in this game, which impacts its equilibria, the game is highly uncertain.¹³⁷ Indeed, legislative reform, though intended to increase the pro-claimant utility of the veterans claims adjudication system, may end up undermining the resulting payoffs of the Nash equilibrium.¹³⁸

1. The Game’s First Move: The VJRA

¹³² See RASMUSEN, *supra* note 10, at 86 (noting that “[i]n a game of incomplete information, Nature moves first”).

¹³³ See *id.* at 83 (showing that this is an uncertain game because nature has the opportunity to move after a player has moved). This is one of the reasons why this Article’s predictions as to payoffs are tenuous at this juncture, given that legislative reforms are being proposed. See *infra* Part III (discussing the Board’s legislative proposals for Fiscal year 2017).

¹³⁴ See RASMUSEN, *supra* note 10, at 32.

¹³⁵ See *id.* at 84.

¹³⁶ See Robert H. Mnookin, 8 HARV. NEGOT. L. REV. 1, 8 (2003).

¹³⁷ See Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 229 (2009).

¹³⁸ See *infra* Part III.C.

In the game of judicially developing the doctrine governing the determination as to the scope of claims, Nature began the game with the passage of the Veterans' Judicial Review Act ("VJRA"). The VJRA established a duty "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits."¹³⁹ This duty to sympathetically read all claims and develop them to their optimum intends to create an informal and non-adversarial claims system.¹⁴⁰ Thus, at the start of the game, the interest of ensuring due process and accurate agency decision-making is at a disadvantage.¹⁴¹

Pursuant to this duty, the veterans claims adjudicator must broadly determine the scope of a claim.¹⁴² They are required to determine what is encompassed in a claim at all times during its pendency and during which the record is still open for submission of additional evidence before a decision on the claim's merits is rendered.¹⁴³ The duty to sympathetically read filings and to develop claims to their optimum requires VA to identify all potential issues, theories of entitlement, and other components within any type of claim, if raised by the evidence¹⁴⁴ or even

¹³⁹ *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (emphasis removed) (interpreting the legislative intent of Congress on passing the VJRA (citing H.R. Rep. No. 100-963, at 13 (1988))).

¹⁴⁰ *See* Ridgway, *Why So Many Remands*, *supra* note 7, at 126-27.

¹⁴¹ *See* RASMUSEN, *supra* note 10, at 55 (noting that in many games, the first player to move has a first mover advantage); *see also* ALIPRANTIS & CHAKRABARTI, *supra* note 72, at 135 (describing the first mover advantage in a legal example); RASMUSEN, *supra* note 10, at 86 (noting that Nature's first move is unobserved by at least one of the players).

¹⁴² *See* *Manio v. Derwinski*, 1 Vet. App. 140, 144 (Vet. App. 1991).

¹⁴³ *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1072 (N.D. Cal. 2008) (explaining that this open record format leads to ten and twenty percent of all applications having new claims or matters raised during the processing of the initial claims); *but see* Ridgway, *Why So Many Remands*, *supra* note 7, at 145-47 (pointing out that given that the numbers of actual claims reported by VA or by the Court do not reflect claims that have been expanded to include inferred matters within the scope of a pending claim, the available numbers are an underrepresentation of the number of decisions and issues rendered each year); Ridgway, *The Veterans' Judicial Review Act Twenty Years Later*, *supra* note 4, at 266 n.96.

¹⁴⁴ *See* *Robinson v. Mansfield*, 21 Vet. App. 545, 553-54 (2008) (though VA has a duty to interpret claims liberally, VA need not *sua sponte* raise and reject "all possible" theories of entitlement).

if not specified by the claimant.¹⁴⁵ Indeed, “[v]eterans benefits litigation is frequently piecemeal,” and the claims process is often inundated with “a continuous stream of evidence and correspondence.”¹⁴⁶ Therefore, the definition of a claim warrants some discussion.

2. The Definition of a Claim as a Constraint in the Game

For every paper submission, electronic filing, or phone call,¹⁴⁷ the veterans claims adjudicator’s first consideration is whether to characterize the filing or phone call as information submitted in a pending claim, as a whole new claim for benefits or increased benefits, or as an application to reopen a previously denied claim for benefits.¹⁴⁸ This characterization directly determines the actions that VA must take to satisfy its duty to sympathetically develop each claim to its optimum.¹⁴⁹

¹⁴⁵ See *id.* at 553; see also *Edwards v. Peake*, 22 Vet. App. 57, 60–61 (2008) (pleadings from a pro se claimant are to be read sympathetically in cases involving waivers of overpayments); *EF v. Derwinski*, 1 Vet. App. 324, 326 (1991); *Myers v. Derwinski*, 1 Vet. App. 127, 130 (1991); *Forshey v. Principi*, 284 F.3d 1335, 1351, 1357 (Fed. Cir. 2002) (stating that in a claim for dependency and indemnity compensation (DIC), pro se claimants are to be treated differently given the complexity of practicing before an appellate court).

¹⁴⁶ *Ingram v. Nicholson*, 21 Vet. App. 232, 253–54 (2007).

¹⁴⁷ See 38 C.F.R. § 3.155(b)(1) (2015) (providing that an intent to file a claim can be submitted by way of saved electronic application, written intent on a prescribed intent to file a claim form, or oral intent communication to designated VA personnel and recorded in writing); see also *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004) (stating that VA has the responsibility of determining when an informal claim has been filed).

¹⁴⁸ See 38 C.F.R. §§ 3.1(p), 20.3(f) (2014) (demonstrating that the terms “application” and “claim” were used interchangeably in the VA regulations prior to the passing of 38 C.F.R. § 3.160 (2015)). There are cases that tend to suggest that pleadings for clear and unmistakable error in a prior agency decision (CUE) are also “claims” and legal doctrine pertaining to the determination of the scope of claims may be applied to CUE motions. See *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001); see also *Andrews v. Nicholson*, 421 F.3d 1278, 1282–83 (Fed. Cir. 2005) (determining that the duty to sympathetically read filings does not apply to CUE pleadings that are filed by counsel); see generally *Acciola v. Peake*, 22, Vet. App. 320, 327 (2008) (recognizing “that the difficult task of sympathetically reading CUE motions must apply common sense to balance reasonable assistance to the veterans against undue burdens on the Secretary and the negative consequences of sympathetically raising weak CUE arguments only to deny them”). However, this Article’s main focus is on the determination of the scope of claims for which there are no formal specificity of pleading requirements, and not situations as those involving pleadings for CUE. See 38 C.F.R. § 20.1404 (2015).

¹⁴⁹ See *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (citing H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794–95).

In brief, to determine whether information was submitted as additional evidence in a pending claim, as an original claim for benefits or increased benefits, or as an application to reopen a previously denied claim for benefits, the veterans claims adjudicator is required to consider whether the new filing pertains to a matter that was encompassed by any previously denied claim for benefits.¹⁵⁰ If the record shows that the previously denied claim for benefits was adjudicated to its optimum and encompasses the subject matter of the new filing, and if the previous decision became final, then the new filing is considered an application to reopen a previously denied claim for service connection.¹⁵¹ New and material evidence is required to reopen the previously denied claim before the claim can be adjudicated on the merits.¹⁵² If the record shows that the claim is still pending, then the filing is considered new evidence submitted in conjunction with the pending claim.¹⁵³ A pending claim is “[a] claim which has not been finally adjudicated.”¹⁵⁴

¹⁵⁰ See generally *Clemons v. Shinseki*, 23 Vet. App. 1, 7 (2009); *Velez v. Shinseki*, 23 Vet. App. 199, 204 (2009) (stating that if a new claim is not based upon a diagnosed disease or injury that is distinct from a claim previously considered, then VA must evaluate whether the evidence submitted since the last final decision tends to substantiate an element of a previously adjudicated matter); cf. *Boggs v. Peake*, 520 F.3d 1330, 1335 (Fed. Cir. 2008) (explaining that “a properly diagnosed disease or injury cannot be considered [on] the same factual basis as [a] distinctly diagnosed disease or injury”).

¹⁵¹ See 38 C.F.R. § 3.160(e) (2015) (defining a reopened claim as “[a]n application for a benefit received after final disallowance of an earlier claim that is subject to readjudication on the merits based on receipt of new and material evidence related to the finally adjudicated claim, or any claim based on additional evidence or a request for a personal hearing submitted more than 90 days following notification to the appellant of the certification of an appeal and transfer of applicable records to the Board of Veterans' Appeals which was not considered by the Board in its decision and was referred to the agency of original jurisdiction for consideration as provided in § 20.1304(b)(1) of this chapter. (Authority: 38 U.S.C. § 501).”). A full discussion of the rules governing applications to reopen is outside the scope of this Article.

¹⁵² See 38 C.F.R. § 3.156(a) (2015).

¹⁵³ See 38 C.F.R. § 3.156(b) (2015).

¹⁵⁴ 38 C.F.R. § 3.160(c) (2015); § 3.160(d) (defining a “finally adjudicated claim” as “[a] claim that is adjudicated by the Department of Veterans Affairs as either allowed or disallowed is considered finally adjudicated by whichever of the following occurs first: (1) The expiration of the period in which to file a notice of disagreement, pursuant to the provisions of § 20.302(a) or § 20.501(a) of this chapter, as applicable; or, (2) Disposition on appellate review.”). A full discussion of the rules governing whether a VA decision is legally final is outside the scope of this Article.

Although this Article below discusses the definition of a claim prior to and since the 2015 regulations, the new regulations' definition of a claim and the prescribed system of submitting formal claims for adjudication do not substantively alter the rules governing the interpretation of the scope of claims.¹⁵⁵ The new formal claims filing system will likely impact the application of the implicit denial doctrine and judgments as to whether VA failed altogether to adjudicate a claim. However, the doctrine pertaining to VA's duty to fully develop and adjudicate all components raised as a part and parcel of a pending claim is substantively unaffected by these regulatory changes.¹⁵⁶

For claims filed on or after March 24, 2015, the new regulations prescribe a system for the filing of formal claims and the processing of intents to file (previously referred to as informal claims).¹⁵⁷ Under these regulations, a complete claim is the submission of an electronic or paper application form that adheres to the following requirements:

[a] submission of an application form prescribed by the Secretary, whether paper or electronic, that meets the following requirements: . . . (3) A complete claim must identify the benefit sought. (4) A description of any symptom(s) or medical condition(s) on which the benefit is based must be provided to the extent the form prescribed by the Secretary so requires¹⁵⁸

A claim for increased benefits is "[a]ny application for an increase in rate of a benefit being paid under a current award, or for resumption of payments previously discontinued."¹⁵⁹ As for intents to file, a claimant

¹⁵⁵ See generally Standard Claims and Appeals Forms, 79 Fed. Reg. 57660, 57672 (Sept. 25, 2014) ("This rule does not alter VA's general practice of identifying and adjudicating issues and claims that logically relate to and arise in connection with a claim pending before VA.").

¹⁵⁶ *Id.*

¹⁵⁷ See §§ 3.155, 3.160.

¹⁵⁸ § 3.160(a).

¹⁵⁹ § 3.160(f).

who indicates a desire to file for benefits under the laws administered by VA, by a communication or action, to include an electronic mail that is transmitted through VA's electronic portal or otherwise, that does not meet the standards of a complete claim is considered a request for an application form for benefits.¹⁶⁰

A claimant may also indicate “a desire to file a claim for benefits by submitting an intent to file a claim to VA Upon receipt of the intent to file a claim, VA will furnish the claimant with the appropriate application form.”¹⁶¹

Significantly, if VA receives a complete application form that is appropriate to the benefit sought within one year of receipt of the intent to file a claim, VA will consider the complete claim filed as of the date the intent to file a claim was received.¹⁶² These regulations make clearer to adjudicators when a claimant intends to file a claim, and therefore mitigates failures to notice an informal claim in the midst of other filings and evidence submitted by the claimant.¹⁶³

For claims filed prior to March 24, 2015, VA's regulatory definition was similar. A claim was defined as “a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit.”¹⁶⁴ The claim began pending on

¹⁶⁰ *Id.*; § 3.155(a); § 3.150(a) (application form).

¹⁶¹ § 3.155(b) (providing that on receipt of this communication, VA shall notify the claimant “of the information necessary to complete the application form or form.”).

¹⁶² *See id.*; *see also* § 3.155(b)(1) (providing that an intent to file a claim can be submitted by way of (1) an electronic application saved in the claims-submission tool within the VA web-based electronic claims applications system prior to the filing of a complete claim; (2) a signed and dated intent to file a claim on the prescribed intent to file a claim form; and (3) an oral statement of intent to file a claim that is directed to a VA employee designated to receive such a communication and the VA employee then records in writing the date and the claimant's intent to file a claim in the claimant's records); § 3.155(b)(2) (“An intent to file a claim must identify the general benefit (e.g., compensation, pension), but need not identify the specific benefit claimed or any medical condition(s) on which the claim is based.”).

¹⁶³ *See* § 3.155.

¹⁶⁴ §§ 3.1(p), 20.3(f) (defining “claim” as an application made under title 38 of the U.S. Code “for entitlement to [VA] benefits or for the continuation or increase of such benefits, or the defense of a proposed agency adverse action concerning beliefs”); 38 U.S.C. § 5100 (The definition of “claimant” is defined as a person “applying for, or submitting a claim for, any benefit under the laws administered by the Secretary.”); 38 C.F.R. § 3.160(a)(2) (2015) (stating that a claimant could also be any individual who is appointed by VA to act as fiduciary for an incompetent

VA's receipt of a claimant's filing that constituted either an informal or a formal claim.¹⁶⁵ However, the definition of a claim was not so clearly defined, and the term "claim" was not used consistently.¹⁶⁶ To remedy this, the U.S. Court of Appeals for Veterans Claims ("Veterans Claims Court") made attempts to adopt a more precise definition.¹⁶⁷ However, on review of the Veterans Claims Court's attempts to define a claim based on its procedural posture and other factors, and given the definition's lack of clarity under the pre-2015 regulations, it appears that the definition of a claim provided under post-2015 regulations works best for purposes of determining the scope of claims, as the broad definition may be universally applied to different benefits and for the duration of the VA adjudication process, and the new regulation clarifies when a claim may be distinguished from an issue that is part and parcel of a claim.

Thus, a claim can be any application for benefits in cases where the claimant does not yet receive any compensation or benefit for his or her complaints.¹⁶⁸ Theories of entitlement are matters that are part and parcel of a claim for benefits, but are not claims themselves.¹⁶⁹ A claim

veteran); *see also* 38 C.F.R. § 20.301(b) (providing that a fiduciary may file or clarify a notice of disagreement or substantive appeal regarding a denial of benefits).

¹⁶⁵ *See* 38 U.S.C. § 5101; *see also* 38 C.F.R. § 3.155.

¹⁶⁶ *See* Michael P. Allen, *The Law of Veterans' Benefits 2008-2010: Significant Developments, Trends, and a Glimpse into the Future*, 3 VETERANS L. REV. 1, 12-21 (2010) [hereinafter Allen, *The Law of Veterans' Benefits 2008-2010*] (discussing briefly what constitutes a "claim" and the general lack of precision as to the definition of claim and how it applies at different stages of the adjudication process).

¹⁶⁷ *See id.* at 17-18.

¹⁶⁸ *See, e.g.,* Rice v. Shinseki, 22 Vet. App. 447, 451 (2009) (describing different ways that the term "claim" has been used in jurisprudence, to include "matters better thought of as issues *within* a claim," "particular claimed disabilities within a single application for benefits by referring to each asserted disability as a separate "claim," while also referring to the application for benefits as a whole as the veteran's "claim," in ways that focus more on the procedural posture of a claim, "when we really mean the specific benefit sought," and "elements of a claim"); *see also* 38 C.F.R. §§ 3.1(p), 3.160 (2015).

¹⁶⁹ *See* Bingham v. Principi, 18 Vet. App. 470, 474-75 (2004); *see also* Roebuck v. Nicholson, 20 Vet. App. 307, 313 (2006) (defining "theory" as a "means of establishing entitlement to a benefit for a disability," and stated that theories pertaining to the same benefit for the same disability constitute components in the same claim).

can also be any application for increased benefits, regardless of how the claimant initially characterizes the application.¹⁷⁰ Entitlements to specific benefits that may be raised as part and parcel of a claim, or “ancillary benefits,” are referred to as “issues *within* a claim.”¹⁷¹

For example, if a claimant submits an application for entitlement to a total disability rating based on individual unemployability (“TDIU”), but not in conjunction with a pending claim for increased benefits, that application is a claim for increased benefits.¹⁷² On the other hand, if a claimant submits an application for an increased rating for a disability, and, during the pendency of that increased rating claim, contends that he or she is precluded from employment due to that same disability, then the matter of entitlement to a TDIU is raised as an issue that is a component of the claim for increased benefits.¹⁷³

B. Modeling the Game of Developing the Duty to Sympathetically Read Claims and the Standard of Reasonableness

This section provides a play-by-play model of the game of judicially developing the standards governing the determination as to the scope of claims. As discussed above, the first move in the game was the VJRA’s enactment, which established the duty to sympathetically read

¹⁷⁰ For example, a claim for increased benefits may first be characterized as a claim for entitlement to an increased rating, or a claim for TDIU (total disability rating based on individual unemployability), but as a whole this is a claim for increased benefits. *See, e.g., Rice*, 22 Vet App. at 453 stating that:

[a]lthough it is clear from our jurisprudence that an initial claim for benefits for a particular disability might also include an assertion of entitlement to TDIU based on that disability (either overtly stated or implied by a fair reading of the claim or of the evidence of record), it is also true that a veteran may, at any time, independently assert entitlement to TDIU based on an existing service-connected disability. Such a request is best analyzed as a claim for an increased disability rating based on unemployability. This type of claim is often referred to by VA as a ‘TDIU claim.’ As a result, VA’s duties to notify and assist, as well as other requirements, apply, just as they would in any other claim for increased compensation.

¹⁷¹ *Id.* at 451. *See also* *Akles v. Derwinski*, 1 Vet. App. 118, 120–21 (1991).

¹⁷² *See Rice*, 22 Vet. App. at 453–54.

¹⁷³ *See id.* at 453.

and develop claims to their optimum. The two players in this game are the two competing interests of veterans law. Player 1 is the interest of ensuring that the veterans claims system is informal and nonadversarial. Player 2 is the interest of ensuring due process and accurate agency decision-making. The Veterans Claims Court and the Federal Circuit are instruments of these interests.

Notably, soon after the VJRA was passed, the Veterans Claims Court adopted a standard of reasonableness by which to liberally construe and sympathetically read and develop a claim to its optimum.¹⁷⁴ The judiciary's adoption of this standard began a repeating game¹⁷⁵ in which the judiciary made normative judgments as to what the record reasonably raised in connection with a claim on a case-by-case basis.¹⁷⁶ Thus, in each case, the judiciary decided whether the interests of informality or procedural due process were sufficiently served.¹⁷⁷ The actions available in this repeating game are to either normatively limit or to normatively expand what is considered reasonable.

Indeed, in the context of determining the scope of veterans claims, reasonableness (and the reasonable person on which the standard is based) is defined normatively by the rational judiciary which use this standard as the workhorse by which they justify their decisions regarding VA's determinations as to the scope of claims.¹⁷⁸ Thus, whenever a case arises in which either competing interest of veterans law is not sufficiently served, the Veterans Claims

¹⁷⁴ See *Hodge v. West*, 155 F.3d 1356, 1362–63 (Fed. Cir. 1998).

¹⁷⁵ See *BAIRD ET AL.*, *supra* note 27, at 313 (defining a repeating game as one in which the players could play a stand-alone game multiple times in succession).

¹⁷⁶ See generally *Zipursky*, *supra* note 44, at 2147–48.

¹⁷⁷ See *infra* Part II.B.1-6.

¹⁷⁸ See *id.* at 2147–49.

Court has provided further normative definitions of what constitutes a reasonable determination as to the scope of a claim.¹⁷⁹ Therefore, the reasonable person in this standard depends completely on the combination of strategies, or the precedential decisions normatively defining what constitutes reasonableness, in the repeating game of creating reasonable standards for determining the scope of claims.

In other words, unlike other areas of law in which a standard of reasonableness is employed, the usage of reasonableness in the context of determining the scope of veterans claims is not defined as practical reason and practical judgment exercised in settings of mutuality or interdependency.¹⁸⁰ It is not based on a bottom-line set of moral values, nor is there a universal standard of reasonableness or universal norm that typifies the reasonable person, nor are there prescribed secondary legal qualities that a reasonable person or claimant should possess.¹⁸¹

The description below models the game of judicially developing the doctrine governing the determination as to the scope of claims since Nature's first move. This play-by-play describes the adoption of a reasonable standard for determining the scope of claims and models a repeating game of normatively defining the reasonable standard. Notably, the development of law depends on a multitude of subcomponents, including the specific facts of the case and whether there are any analogous facts in prior cases. However, this model allows for the game to be "blackboxed" and reduced to the simplest "no fat" model such that any subcomponents of strategy combinations are modeled in a cursory way.¹⁸² Accordingly, this Article models each player's moves with little or no description of the specific facts of each case. Figure 1, below,

¹⁷⁹ *E.g.*, *Hodge*, 155 F.3d at 1360.

¹⁸⁰ *See* Zipursky, *supra* note 44, at 2142–43.

¹⁸¹ *See generally id.*, at 2043–45.

¹⁸² RASMUSEN, *supra* note 10, at 22. *See also* Ayres, *supra* note 26, at 1296–97.

illustrates the model's first three moves. Positive and negative payoffs for each interest are shown in parentheses.

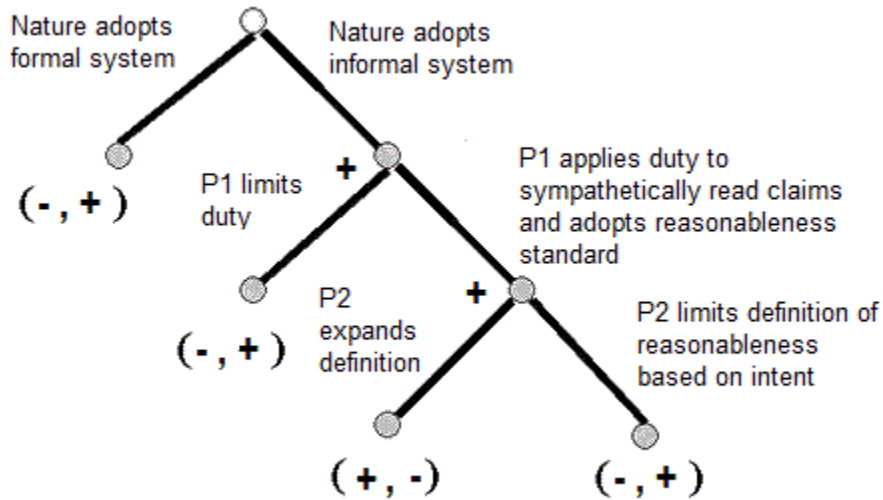


Figure 1. *Payoffs: (Informality, Due Process)*

1. Player 1's Chosen Strategy: Apply Informal Standard and Adopts Standard of Reasonableness

After Nature enacted the VJRA, Player 1 (i.e., the interest of informality) applied the duty to sympathetically read claims to cases in which the claimant is *pro se*. Then, Player 1 adopted a standard of reasonableness for determining the scope of claims and applied this standard to claims for benefits and claims for increased benefits.

The U.S. Court of Appeals for Veterans Claims' ("Veterans Claims Court") very first case, *In re Quigley*,¹⁸³ held that *pro se* allegations and prayers for relief should be liberally construed.¹⁸⁴ The Veterans Claims Court also clarified that VA's duty to assist the claimant in

¹⁸³ 1 Vet. App. 1 (1990).

¹⁸⁴ *Id.* at 1.

developing a claim to its optimum is an integral part of the informal and nonadversarial nature of the claims system.¹⁸⁵ It emphasized that when a claim is not fully developed to its optimum under the statutory duty to assist, the Board of Veterans' Appeals ("Board") must remand the claim to the agency of original jurisdiction ("AOJ") for further development.¹⁸⁶ The Veterans Claims Court further clarified that if the record "reasonably reveals that the claimant is seeking a particular benefit, the Board is required to adjudicate the issue of the claimant's entitlement to such a benefit or, if appropriate, to remand the issue to the RO for development and adjudication of the issue."¹⁸⁷

Then, in *Myers v. Derwinski*,¹⁸⁸ the Veterans Claims Court adopted a standard of reasonableness for liberally and sympathetic reading of a claim.¹⁸⁹ Specifically, the Veterans Claims Court held that "the [Board] must review all issues which are reasonably raised from a liberal reading of the appellant's substantive appeal."¹⁹⁰ As discussed above, the adoption of this reasonable standard began a pure-strategy Nash equilibrium in which Player 1 and Player 2 must choose either to expand or limit the normative definition of reasonableness.¹⁹¹ Later, in *EF v. Derwinski*,¹⁹² the Veterans Claims Court discussed *Myers* to conclude that "VA's statutory 'duty

¹⁸⁵ See *Littke v. Derwinski*, 1 Vet. App. 90, 91 (1990).

¹⁸⁶ See *id.* at 92.

¹⁸⁷ *Suttman v. Brown*, 5 Vet. App. 127, 132 (1993).

¹⁸⁸ 1 Vet. App. 127 (1991).

¹⁸⁹ *Id.* at 130.

¹⁹⁰ *Id.*

¹⁹¹ See RASMUSEN, *supra* note 10, at 31.

¹⁹² 1 Vet. App. 324 (1991).

to assist' must extend this liberal reading to include issues raised in all documents or oral testimony submitted prior to the [Board's] decision."¹⁹³

Specifically regarding claims for increased benefits, *Akles v. Derwinski*,¹⁹⁴ provided that the issue of entitlement to the benefit of special monthly compensation ("SMC") is part and parcel of a claim for increased benefits and is therefore an inferable issue.¹⁹⁵ The Veterans Claims Court in *Akles* noted that pursuant to the nonadversarial nature of the claims system, the claimant need not specify with precision the benefits for which he seeks entitlement, and that the issue of entitlement to SMC may be inferred if raised by the record.¹⁹⁶ In another case, the Veterans Claims Court held that VA's statutory duty to assist provides that a VA medical examination report or other medical evidence can constitute an informal claim for increased benefits.¹⁹⁷ Another case provided that if a claimant states that he is unemployable due to a pending service-connected disability, then the issue of entitlement to TDIU is informally raised as part of a claim for increased benefits.¹⁹⁸

Then, significantly, in *AB v. Brown*,¹⁹⁹ the Veterans Claims Court held that claimants are presumed to be seeking the maximum rating and all the available ratings provided by law, unless there is an express indication of an intent by the claimant to limit a claim or appeal to the issue of entitlement to a particular disability rating which is less than that maximum disability rating

¹⁹³ *Id.* at 326.

¹⁹⁴ 1 Vet App. 118 (1991).

¹⁹⁵ *Id.* at 121.

¹⁹⁶ *See id.* at 120-21.

¹⁹⁷ *See Servello v. Derwinski*, 3 Vet. App. 196, 200 (1992).

¹⁹⁸ *See Collier v. Derwinski*, 2 Vet. App. 247, 251 (1992).

¹⁹⁹ 6 Vet. App. 35 (1993).

allowed by law.²⁰⁰ Then, pursuant to another case, this presumption that claimants seek the maximum rating applies to extraschedular ratings as well.²⁰¹

On review, it appears that the interest of informality gained a first-move advantage, given that the player was able to take several turns in one play to attain payoffs for informality.

2. Player 2's Chosen Strategy: Limit the Definition of Reasonableness Based on Claimant's Intent

Thereafter, Player 2, the interest of due process and accurate decision-making (“due process”), limited the definition of reasonableness so as to preclude “the exercise in prognostication” when determining the scope of a claim.

In *Talbert v. Brown*,²⁰² the Veterans Claims Court acknowledged that the Board must “review all issues which are reasonably raised from a liberal reading of the appellant’s substantive appeal.”²⁰³ However, the Veterans Claims Court held that “[t]he ‘liberal reading’ requirement does not require the Board to conduct an exercise in prognostication, but only requires that it consider all issues reasonably raised by the appellant’s substantive appeal.”²⁰⁴ The Veterans Claims Court stated, “there must be some indication in the appellant’s [substantive appeal] that he wishes to raise a particular issue before the Board. The indication need not be

²⁰⁰ *Id.* at 38–39; *see also* *Shoemaker v. Derwinski*, 3 Vet. App. 248, 253 (1992).

²⁰¹ *See* *Floyd v. Brown*, 9 Vet. App. 88, 102 (1996); *see also* *Johnson v. McDonald*, 762 F.3d 1362, 1365 (2014) (explaining that a veteran may be awarded an extraschedular rating based upon the combined effect of multiple conditions in an exceptional circumstance where the evaluation of the Veteran’s conditions fail to capture all the service-connected disabilities experienced, if the veteran indicates or if the record indicates that the depending disability results in further disability when looked at in combination with his other service-connected disabilities.); *Yancy v. McDonald*, 27 Vet. App. 484, 495 (2016) (“Nothing in *Johnson* changes the long-standing principle that the issue of whether referral for extraschedular consideration is warranted must be argued by the claimant or reasonably raised by the record.”).

²⁰² 7 Vet. App. 352 (1995).

²⁰³ *Id.* at 356 (quoting *Myers v. Derwinski*, 1 Vet. App. 127, 130 (1991)).

²⁰⁴ *Id.*

expressed or highly detailed; it must only reasonably raise the issue.”²⁰⁵ In a later case, the Veterans Claims Court held that “[t]he mere presence of the medical evidence does not establish an intent on the part of the [claimant] to seek secondary service connection”²⁰⁶ Accordingly, a theory of entitlement is raised only when the record contains evidence that the appellant expressed an intent to seek a theory of entitlement as a component of a claim for benefits.²⁰⁷

3. Player 1’s Chosen Strategy: Apply Definition of Reasonableness to Determination of Whether a Prior Claim or Issue is Still Pending

Thereafter, Player 1, the interest of informality, applied the standard of reasonableness to the determination as to whether an issue is still pending and therefore within the scope of a claim. Player 1 also reemphasized that the standard of reasonableness is based on the intent of a *pro se* lay claimant.

Pursuant to *Norris v. West*,²⁰⁸ which pertained to a claim for increased benefits, if the claimant’s evaluation meets the minimum scheduler requirements for TDIU, and if there is evidence of unemployability, then the issue of entitlement to TDIU is reasonably raised.²⁰⁹ Further, if the issue of TDIU is reasonably raised but is not adjudicated, then the issue remains pending.²¹⁰ The Veterans Claims Court held that if VA fails to recognize a reasonably raised claim for increased benefits (e.g., a claim first submitted as one for entitlement to TDIU), then

²⁰⁵ *Id.*

²⁰⁶ *Brannon v. West*, 12 Vet. App. 32, 35 (1998).

²⁰⁷ *Id.* (noting that medical evidence may be accepted as informal claims for increased benefits).

²⁰⁸ 12 Vet. App. 413 (1999).

²⁰⁹ *Id.* at 421–22.

²¹⁰ *See id.* at 417, 422.

that claim has not been fully and sympathetically developed to its optimum, has not been adjudicated, and therefore remains pending.²¹¹

The basis of Player 1's strategy in *Norris* was the origin of the legal canon pertaining to pending claims that evolved into the implicit denial doctrine.²¹² As noted above, in a single game, there may be multiple equilibria.²¹³ Indeed, many of the judiciary's decisions since the creation of the pending claim canon impact both the equilibrium pertaining to the reasonable standards for determining the scope of claims and this new equilibrium that has resulted in the implicit denial doctrine.²¹⁴ As noted above, the equilibrium that resulted in the development of the implicit denial doctrine is not the focal point in this game theory model.²¹⁵

The duty to sympathetically interpret the scope of claims also applies to appeals. In *Anderson v. Principi*,²¹⁶ the Veterans Claims Court held that notices of disagreement should be liberally interpreted to determine whether a statement expressing dissatisfaction with the RO's determination can serve to put the claim in appellate status.²¹⁷

²¹¹ *See id.* at 421–22.

²¹² *See* discussion *infra* Part II.C.

²¹³ *See supra* Part I.D.

²¹⁴ *See* discussion *infra* Part II.C.

²¹⁵ *See, e.g.*, Fussell & Hager, *supra* note 131 (providing a comprehensive discussion of the genesis of the implicit denial doctrine and the legal canon pertaining to pending claims); *see infra* Part II.C. (discussing the intersection between the reasonable standards for determining the scope of a pending claim and the doctrine of implicit denial); *see also* Szemraj v. Principi, 357 F.3d 1370, 1372–73 (Fed. Cir. 2004) (discussing the intersection of the duty to sympathetically read and develop claims to their optimum to the legal canon pertaining to pending claims and the use of motions for CUE as mechanisms for challenging VA's failure to adjudicate a claim to its optimum).

²¹⁶ 18 Vet. App. 371 (2004).

²¹⁷ *Id.* at 375.

Then, in *Ingram v. Nicholson*²¹⁸ the Veterans Claims Court held that a motion for clear and unmistakable error in a prior VA decision is an appropriate mechanism with which to challenge VA's failure to adjudicate a claim to its optimum.²¹⁹ Although *Ingram* is a seminal case in the legal canon pertaining to pending claims and the doctrine of implicit denial, the Veterans Claims Court comprehensively examined and reaffirmed legal precedent pertaining to the duty to sympathetically read and fully develop claims to their optimum.²²⁰ The Veterans Claims Court stated that

[a]lthough there is no statutory or regulatory definition of "sympathetic reading," it is clear from the purpose of the doctrine that it includes a duty to apply some level of expertise in reading documents to recognize the existence of possible claims that an unsophisticated pro se claimant would not be expected to be able to articulate clearly.²²¹

The Veterans Claims Court further stated that

[t]he duty to sympathetically read exists because a pro se claimant is not presumed to know the contents of title 38 or to be able to identify the specific legal provisions that would entitle him to compensation [I]t is precisely because unsophisticated claimants cannot be presumed to know the law and plead claims based on legal elements that the Secretary must look at the conditions stated and the causes averred in a pro se pleading to determine whether they reasonably suggest the possibility of a claim for a benefit under title 38, regardless of whether the appellant demonstrates an understanding that such a benefit exists or of the technical elements of such a claim.²²²

Player 1 recurrently relies on this language in *Ingram* in its actions going forward. This play has resulted in adjudicators implementing the standard of reasonableness to determine the scope of a

²¹⁸ 21 Vet. App. 232 (2007).

²¹⁹ *Id.* at 254–55.

²²⁰ *See id.* at 255–56.

²²¹ *Id.* at 255.

²²² *Id.* at 256.

claim for purposes of developing a claim to its optimum, as well as for purposes of determining whether a prior raised issue within the claim is still pending.

4. Player 2's Chosen Strategy: Limit Definition of Reasonableness to Include Consideration of Whether Claimant is Represented by Counsel

Thereafter, Player 2, the interest of due process, recognized that the lay claimant's intent may not be an appropriate basis to determine the scope of a claim when the claimant is represented by counsel.

In *Robinson v. Peake*,²²³ the Veterans Claims Court then began to emphasize the factor of whether the claimant had an attorney before VA when determining whether a matter is reasonably raised by the record in a claim for benefits.²²⁴ The claimant expressly argued that his disability was secondary to a service-connected disability, which is one theory by which entitlement to service connection may be granted.²²⁵ The claimant did not expressly argue that his disability was directly related to service.²²⁶ In finding that the theory of entitlement of direct service connection was not reasonably raised by the record, the Veterans Claims Court stated that “[t]he presence of [the attorney] throughout the appeals process before the Agency is a significant factor that solidifies our conclusion.”²²⁷ The Veterans Claims Court noted that the attorney in this case was experienced in the field of veterans law, and that the attorney “says what he means and means what he says.”²²⁸ It was significant to the Veterans Claims Court that

²²³ 21 Vet. App. 545 (2008), *aff'd*, *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

²²⁴ *Id.* at 554–55.

²²⁵ *See id.*

²²⁶ *See id.*

²²⁷ *Id.* at 554 (citing *Andrews v. Nicholson*, 421 F.3d 1278, 1283 (2005) (involving a motion for CUE)).

²²⁸ *Id.*

the attorney “specifically used the term ‘secondary service connection’ and presented arguments consistent with the meaning of that term.”²²⁹ Thus, the Veterans Claims Court held that

[w]here an attorney uses terms of art that make sense in the context used, the Board may reasonably conclude that there is no ambiguity to be resolved with a sympathetic reading or liberal construction of the [claims]. In contrast, where a lay person uses a term of art, the Board should still read the whole submission critically rather than assuming that the language was used correctly.²³⁰

Player 2’s action in *Robinson* clearly competes with the interest of ensuring informality and a nonadversarial claims system.²³¹ However, the Federal Circuit affirmed *Robinson* and stated, “[w]here a fully developed record is presented to the Board with no evidentiary support for particular theory of recovery, there is no reason for the Board to address or consider such a theory.”²³²

5. Player 1’s Chosen Strategy: Expand Definition of Reasonableness Based on the Pro Se Lay Claimant’s Intent

After Player 2’s above play, the Federal Circuit clarified that a claimant is considered pro se even if he or she is represented by a veterans service organization, which is not considered equivalent to legal representation.²³³ In *Clemons v. Shinseki*,²³⁴ when faced with a situation in

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *See id.* at 558–65 (Schoelen, J., dissenting).

²³² *See Robinson v. Shinseki*, 557 F.3d 1355, 1361 (Fed. Cir. 2009).

²³³ *See Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009). The court opined:

Representation by an organizational aide is not equivalent to representation by a licensed attorney. Although aides from veterans’ service organizations provide invaluable assistance to claimants seeking to find their way through the labyrinthine corridors of the veterans’ adjudicatory system, they are ‘not generally trained or licensed in the practice of law.

(citing *Cook v. Brown*, 68 F.3d 447, 451 (Fed.Cir.1995).

²³⁴ 23 Vet. App. 1 (2009).

which the claim for benefits was not fully developed due to the claimant's lack of medical sophistication in expressing his disability, the Veterans Claims Court relied on *Ingram* in its adoption of a reasonable standard for determining whether certain disabilities and diagnoses are within the scope of claims for entitlement to service connection.²³⁵ The Veterans Claims Court emphasized that a claimant is not required to have the medical expertise to specify the diagnoses for which he or she seeks compensation,²³⁶ just as the claimant is not required to have the legal expertise in order to specify the theories of entitlement.²³⁷

The Veterans Claims Court in *Clemons* concluded that even if the claimant attempts to identify the specific diagnosis, his claim may still encompass disabilities not specifically identified.²³⁸ It noted that a claimant is competent to describe his symptoms, to include which bodily functions or anatomical body parts are affected, and to describe his history and symptomatology.²³⁹ Given this competency, the Veterans Claims Court held that “[a]lthough the RO has no duty to read the mind of the claimant, the RO should construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim.”²⁴⁰

²³⁵ *Id.* at 5.

²³⁶ *See id.* at 4.

²³⁷ *See id.* at 5; *see also* Brokowski v. Shinseki, 23 Vet. App. 79, 86 (2009) (holding that a claimant can sufficiently file a claim “by referring to a body part of system that is disabled or by describing symptoms of the disability.”); Edwards v. Peake, 22 Vet. App. 57, 60–61 (2008).

²³⁸ *See Clemons*, 23 Vet. App. at 5.

²³⁹ *See id.* at 4–5 (citing Jandreau v. Nicholson, 492 F3d 1372, 1376–77 (Fed. Cir. 2007)).

²⁴⁰ *Id.* at 5 (citing *Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007)) (“*Ingram* made clear that the claimant’s intent in filing a claim is paramount to construing its breadth, especially because ‘[i]t is the pro se claimant who knows what symptoms he is experience that are causing him disability.’” (alteration in original)).

Specifically regarding claims for increased benefits, in *Rice v. Shinseki*,²⁴¹ the Veterans Claims Court addressed a case in which the issue of entitlement to TDIU may be part and parcel of a claim for increased benefits. It held that

a request for TDIU, whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities, either as part of the initial adjudication of a claim or, if a disability upon which entitlement to TDIU is based has already been found to be service connected, as part of a claim for increased compensation.²⁴²

Rice supports the inference that as long as the claim for increased benefits remains pending, the issue of TDIU claim remains pending. Thus, even if the veteran does not submit a notice of disagreement with an AOJ decision to deny entitlement to a TDIU, and if a notice of disagreement is submitted with another portion of the increased benefits claim (e.g., the issue of entitlement to an increased rating), then the issue of TDIU must still be considered in conjunction with the claims for increased benefits that is on appeal.²⁴³

Then, to attain even greater payoffs for the interest of informality, in *DeLisio v. Shinseki*,²⁴⁴ the Veterans Claims Court held that

when a claim is *pending* and information obtained reasonably indicates that the claimed condition is *caused* by a disease or other disability that may be associated with service, the Secretary generally must investigate the possibility of secondary service connection; and, if that causal disease or disability is, in fact, related to service, the pending claim reasonably encompasses a claim for benefits for the causal disease or disability, such that no separate filing is necessary to initiate a

²⁴¹ 22 Vet. App. 447 (2009).

²⁴² *Id.* at 453–54.

²⁴³ See *id.* at 453–55; see also M21-1 Part IV.ii.2 § F.2.m, “Identifying Reasonably Raised Claims of IU” (providing that when the veteran filed a notice of disagreement with a denial of TDIU and subsequently claims that a service-connected disability not on appeal precludes employability and the rating decision fails to increase the evaluation to the maximum rating provided by the Schedule, that previous non-pending disability will also be considered in appellate status).

²⁴⁴ 25 Vet. App. 45 (2011).

claim for benefits for the causal disease or disability, and such that the effective date of benefits for the causal disability can be as early as the date of the pending claim.²⁴⁵

The implications of this non-cooperative play in *Delisio* within the Nash equilibrium (e.g., this decision does not provide a method for VA to obtain independent medical evidence to determine whether a claim for a causal disability is reasonably raised; this decision does not take into account long-standing law providing that there must be intent to seek benefits for there to be a claim) are discussed below.²⁴⁶

6. Player 2's Chosen Strategy: Emphasized that the Definition of Reasonableness Should Include Consideration of Whether Claimant is Represented By Counsel

In light of the increasing numbers of cases in which the claimant is represented by counsel before VA, in *Massie v. Shinseki*,²⁴⁷ the Veterans Claims Court relied on *Robinson* and clarified that although the doctrine of sympathetically reading claims applies to the interpretation of any matter before the agency, regardless of whether the claimant had counsel at some time before VA, what is considered reasonably raised by the record depends on whether the claimant had counsel.²⁴⁸ The Veterans Claims Court, following *Cogburn*, stated that, “representation [by an attorney] may be a factor in determining the *degree* to which the pleading is liberally construed.”²⁴⁹ The Veterans Claims Court added that “in interpreting Mr. Massie’s pleadings, the

²⁴⁵ *Id.* at 55. *Cf.* *Young v. McDonald*, 766 F.3d 1348, 1354 n.3 (Fed Cir. 2014) (declining to apply *Delisio*, as the veteran’s original claim for the so-alleged secondary disability “is not pending and no information suggest[ed] that [the veteran’s] PTSD was caused by another disability diagnosed later.”).

²⁴⁶ *See infra* Part III.

²⁴⁷ 25 Vet. App. 123, 129 (2011) (stating that it will hold veterans to a higher standard in regard to matters when those veterans have an attorney before VA).

²⁴⁸ *Id.*

²⁴⁹ *Id.* (quoting *Cogburn v. Shinseki*, 24 Vet App 205, 213 (2010) (alteration in original) (outlining the doctrine of implicit denial)) (internal quotation marks omitted).

Board, although required to provide a liberal reading, was entitled to assume that the arguments presented by Mr. Massie were limited for whatever reason under the advice of counsel and that those were the theories upon which he intended to rely.”²⁵⁰

At this juncture, the game does not appear to have reached its conclusion. There is opportunity for the judiciary’s future decisions to further refine the normative definition of reasonableness for purposes of determining the scope of claims. This Article notes certain areas that may be addressed and clarified in the future.²⁵¹ Notably, underlying many of these cases is an open question of whether the Veterans Claims Court has jurisdiction over the Board’s implicit or explicit determinations as to the scope of claims and whether the Veterans Claims Court should invoke the doctrine of exhaustion.²⁵² However, comprehensive discussion as to the same is outside the scope of this Article.²⁵³

²⁵⁰ *Id.* at 131.

²⁵¹ *See* Part III.B.

²⁵² *See, e.g., id.* at 126–28; Ridgway, *Why So Many Remands*, *supra* note 7, at 135.

²⁵³ *See, e.g.,* Tyrues v. Shinseki, 631 F.3d 1380, 1381, 1383 (Fed. Cir. 2011), *aff’d in part*, Tyrues v. Shinseki, 732 F.3d 1351 (Fed. Cir. 2013) (affirming Court’s decision regarding jurisdiction over a “mixed” Board decision that “[s]eparate claims are separately appealable. Each particular claim for benefits may be treated as distinct for jurisdictional purposes.”); *see also* Maggitt v. West, 202 F.3d 1370, 1372–73, 1377 (Fed. Cir. 2000) (the Court may remand a matter for consideration in the first instance even if the appellant is raising an issue for the first time before the Court); Young v. Shinseki, 25 Vet. App. 201, 202–03 (2012) (determining that the Court had jurisdiction over the Board’s determination to refer a component of a claim instead of remanding the issue); Beverly v. Nicholson, 19 Vet. App. 394, 405 (2005) (determining the existence of the Court’s jurisdiction “turns on whether the [special monthly compensation (SMC) for aid and attendance] claim was reasonably raised to the Board”); Michael P. Allen, *Veterans’ Benefits Law 2010-2013: Summary, Synthesis, and Suggestions*, 6 VETERANS L. REV. 1, 14–15 (2014) [hereinafter Allen, *Veterans’ Benefits Law 2010-2013*].

C. The Intersection of the Reasonable Standard for Determining the Scope of Claims and the Doctrine of Implicit Denial

The sequence of cases that make up the doctrine of implicit denial predominantly borrows from the strategies in the Nash equilibrium discussed above.²⁵⁴ However, it is unlikely that the equilibrium is a cooperative Nash equilibrium, given the implications that the doctrine of implicit denial have on the preexisting rules governing when a VA decision becomes legally final.²⁵⁵ Furthermore, although the current doctrine is laid out clearly by the Veterans Claims Court in *Cogburn v. Shinseki*,²⁵⁶ there are apparent inconsistencies in the prior sequential judicial development of the doctrine.²⁵⁷ For these reasons, it would not be appropriate to shoehorn the judicial development of the implicit denial doctrine into the game-theoretical model demonstrated above in order to analyze the payoffs for informality and due process that result from the implicit denial doctrine. Accordingly, this Article focuses only on the intersection between the equilibrium encompassing the doctrine of implicit denial and the Nash equilibrium encompassing the doctrine governing the determination as to the scope of claims.

²⁵⁴ See *Norris v. West*, 12 Vet. App. 413, 417 (1999) (relying on cases in the Nash equilibrium pertaining to determining the scope of pending claims: *EF v. Derwinski*, 1 Vet. App. 324, 326 (1991); *Collier v. Derwinski*, 2 Vet. App. 247, 251 (1992); see also *Akles v. Derwinski*, Vet. App. 118, 121 (1991)); see, e.g., *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (relying on *Hodge v. West*, 155 F. 3d 1356, 1362 (Fed. Cir. 1998)); *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001) (relying on *Norris*); *Ingram v. Nicholson*, 21 Vet. App. 232, 238 (2007) (relying on *Szemraj*).

²⁵⁵ A comprehensive discussion on the rules governing whether a prior VA decision is final is outside the scope of this Article. Suffice to say, the concept of a VA decision's legal finality is "nebulous." See *Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 114th Cong. 7 (2015) (statement of Laura Eskenazi, Acting Chairman, Board of Veterans' Appeals)); see also *Ridgway, The Veterans' Judicial Review Act Twenty Years Later*, *supra* note 4, at 258–59, 268, 281; *Ridgway, Why So Many Remands*, *supra* note 7, at 128–29; *Fussell & Hager, supra* note 131, at 173.

²⁵⁶ See *Cogburn v. McDonald*, 24 Vet. App. 205, 210–13 (2010), *aff'd*, 809 F.3d 1232 (Fed Cir. 2016).

²⁵⁷ See *Fussell & Hager, supra* note 131, at 145–46.

As previously noted, when a claim is filed or is reasonably raised, it will remain pending until there is an explicit adjudication for the same disability or until the claimant could reasonably recognize in a subsequent agency decision that the claim was fully adjudicated.²⁵⁸ On the other hand, pursuant to the implicit denial doctrine, under certain circumstances “a claim for benefits will be deemed to have been denied, and thus finally adjudicated, even if [the RO or the Board] did not expressly address that claim in its decision.”²⁵⁹ The Veterans Claims Court has held that this doctrine can apply in cases where there is a claim for increased benefits because there can be an implicit denial of an issue that is part and parcel of that claim such as entitlement to TDIU when the matter of TDIU was essentially part and parcel of a claim for increased compensation.²⁶⁰

The standard for determining whether a claim is implicitly denied is based in large part on whether a reasonable person would recognize that the prior claim was denied.²⁶¹ Further, the implicit denial doctrine is, at its heart, a notice doctrine in that it significantly depends on whether the claimant had notice that his full claim was denied and that he has the opportunity to appeal.²⁶² For these reasons, the standard of reasonableness in the doctrine of implicit denial is

²⁵⁸ See *Ingram v. Nicholson*, 21 Vet. App. 232, 243 (2007). In *Ingram*, the Court was determining whether there was an implicit denial in the claim after the claimant filed a motion alleging clear and unmistakable error (CUE) in a prior RO decision for failure to adjudicate a claim. See *id.* at 239. The Court concluded that CUE is a proper mechanism to challenge VA’s failure to adjudicate a claim. See *id.* at 242, 249.

²⁵⁹ *Adams v. Shinseki*, 568 F.3d 956, 961 (Fed. Cir. 2009). For instance, a claim will be implicitly denied if the claimant files two claims at the same time, and the RO addresses one claim but fails to address the other. See *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006). Also, an original claim will be implicitly denied if the claim is filed but is not addressed until a later claim for the same matter is eventually adjudicated and denied. See *Williams v. Peake*, 521 F.3d 1348, 1350 (Fed. Cir. 2008); see also *Jones v. Shinseki*, 619 F.3d 1368, 1373 (Fed. Cir. 2010).

²⁶⁰ See *Locklear v. Shinseki*, 24 Vet. App. 311, 315–16 (2011).

²⁶¹ See *Cogburn*, 24 Vet. App. at 216.

²⁶² See *Adams v. Shinseki*, 568 F.3d 956, 961 (Fed. Cir. 2009); see also *Jones*, 619 F.3d at 1373 (asking a key question for whether there is an implied denial of a claim is whether the claimant has sufficient notice such that he

based on the claimant's perception, similar to the doctrine governing the determination as to the scope of claims.

The standard of reasonableness in the doctrine of implicit denial is one of four factors that the Veterans Claims Court in *Cogburn* provided for determining whether there is an implicit denial of a claim (or a component within a claim).²⁶³ This factor is “the specificity of the adjudication, i.e., does the adjudication allude to the pending claim in such a way that it could reasonably be inferred that the prior claim was denied?”²⁶⁴ The Veterans Claims Court reminded the Board that this determination should be made pursuant to a reasonable person standard, as is provided by prior case precedent.²⁶⁵

Another relevant factor is “whether the claimant is represented.”²⁶⁶ If a claimant had counsel before the agency when the claim was pending before the agency, it is more likely that claim will be deemed implicitly denied.²⁶⁷ Interestingly, the Veterans Claims Court separated the factor of representation by counsel from the standard of reasonableness.

Part II showed the genesis of the duty to sympathetically read claims and develop claims to their optimum, to include an overview of the judiciary's repeating game of normatively

or she would be reasonably expected to understand that entitlement to benefits for the claimed disability was denied, and such that the claimant can decide whether to continue on with attempting to substantiate the claim or to accept the decision).

²⁶³ See *Cogburn*, 24 Vet. App. at 212–15. The first factor is “the specificity of the claims or the relatedness of the claims.” *Id.* at 212. The Court noted that this first factor may be considered in light of the legal standards under which the claimant is seeking benefits. See *id.* Thus, given that a claimant is not a medical professional, the claimant “must describe the nature of the disability for which he is seeking benefits . . . by referring to a body part or system that is disabled or by describing symptoms of a disability.” *Id.* at 215. Another factor is “the timing of the claims.” *Id.* at 213.

²⁶⁴ *Id.* at 212.

²⁶⁵ See *id.* at 216.

²⁶⁶ *Id.* at 213.

²⁶⁷ See *id.* at 217.

defining the standard of reasonableness for determining the scope of claims. The following Part discusses the outcome of this game. Part III defines the judiciary's current standard of reasonableness in the context of doctrine governing the scope of claims and discusses the import of this standard to the implicit denial doctrine. Further, the next Part resolves loose ends in the game and proposes that the game be abandoned altogether.

III. Current and Predicted Outcomes of the Game and a Familiar Proposal To Create a Globally Optimal System

In this Part, the game is solved. First, Part III.A explains the utility of the standard of reasonableness for purposes of judicial review and for purposes of providing guidance to agency decision-makers. This section then determines the reasonable person in the context of claims for benefits, claims for increased benefits, and for purposes of determining whether there is an implicit denial of a claim or component of a claim. Part III.B then suggests strategies to tie up loose ends in the game pertaining to inferring ancillary benefits other than TDIU and SMC in claims for increased benefits and pertaining to the noncooperative play in *Delisio v. Shinseki*.²⁶⁸ Lastly, given the practical inefficiencies of the game despite the fact that the Nash equilibrium is optimized for both competing interest of veterans law, Part III.C proposes that the system should be reinvented from scratch with careful planning and with the goal of creating and implementing a veterans claims adjudication system that is a global optimum.

A. The Utility of the Standard of Reasonableness and Who Is the Reasonable Person

Since the VJRA's enactment, VA claims adjudicators are required to sympathetically read submissions to determine what is encompassed in a claim at all times during the pendency

²⁶⁸ 25 Vet. App. 45 (2011).

of a claim.²⁶⁹ It quickly became apparent that a broad duty to sympathetically read claims and to develop each claim to its fullest did not sufficiently guide the VA claims adjudicators in rendering liberal interpretations as to the scope of claims.²⁷⁰ As discussed above, the Veterans Claims Court chose to adopt a standard of reasonableness for determining the scope of claims,²⁷¹ and, on review, it appears to be an effective workhorse to ensure payoffs for both competing interests of veterans law. Further, the judiciary has provided normative definitions of what is reasonable to determine the scope of claims for benefits and claims for increased benefits, as well as for purposes of determining whether there is an implicit denial in a prior agency decision.²⁷²

1. Using the Standard of Reasonableness for Purposes of Judicial Review and Providing Guidance to VA Decision-Makers

The standard of reasonableness is used in a multitude of ways and for a multitude of reasons in various fields of law.²⁷³ In the veterans claims adjudication system, the standard of reasonableness is particularly suitable because it can serve both competing interests of veterans law. On one hand, the reasonableness standard is sufficiently vague²⁷⁴ so as to allow for veterans claims adjudicators to broadly determine the scope of claims and to maintain the informality and non-adversarial nature of the system. On the other hand, the reasonableness standard allows for judicial review of agency determinations as to the scope of claims and allows the Veterans

²⁶⁹ See *supra* Part II.B.

²⁷⁰ See, e.g., *Ingram v. Nicholson*, 21 Vet. App. 232, 253–54 (2007).

²⁷¹ See *Myers v. Derwinski*, 1 Vet. App. 127, 130 (1991).

²⁷² See *supra* Part II.C.

²⁷³ See *Zipursky*, *supra* note 44, at 2135–50.

²⁷⁴ See *generally id.* at 2133.

Claims Court to delegate to VA fact-finders its own judgment of what constitutes a reasonable determination as to the scope of the claim so that VA decision-makers are provided guidance as to the same.²⁷⁵ Thus, the Veterans Claims Court adopted a standard of reasonableness for determining the scope of claims, which is currently used for purposes of judicial review and the provision of decision-making guidance for VA’s claims adjudicators.

For purposes of judicial review regarding the correctness of a determination by VA as to the scope of a claim, the Veterans Claims Court uses a standard of reasonableness to determine whether the VA claims adjudicator—the fact-finder in the case—permissibly exercised his or her judgment as to the scope of the claim.²⁷⁶ The Veterans Claims Court can disagree with the adjudicator’s interpretation if the interpretation is found to be unreasonable.²⁷⁷ In these cases, the Veterans Claims Court can then substitute such a finding with its own judgment as to what is reasonably encompassed in the scope of the claim.²⁷⁸

The Veterans Claims Court’s determinations as to what is “reasonable” are meant to guide VA in its future determinations as to the scope of claims, although the Veterans Claims Court’s determinations are not necessarily law creation, in that their normative definitions of

²⁷⁵ See generally *id.* at 2147-49.

²⁷⁶ See, e.g., *Delisio v. Shinseki*, 25 Vet. App. 45, 53 (2011).

²⁷⁷ See generally Zipursky, *supra* note 44 at 2139–40 (discussing deference for judgment of fact-finders as to reasonable findings in civil litigation trials and circumspecting deference for an agency’s judgment under *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)). A comprehensive discussion of this tension between the doctrine of veteran friendliness and deference for agency fact-findings is outside the scope of this Article, but can be found in such articles as Ridgway, *Toward a Less Adversarial Relationship Between Chevron and Gardner*, *supra* note 9, at 414–20 (discussing how “[o]pposing sides invoke the doctrines of veteran friendliness and deference, respectively, most often when the agency is advocating for a position that, while unspoken, is intentionally unfriendly to veterans. This is a suspect proposition, however. The individual values of agency employees often strongly align with the agency’s mission, and, arguably, agency employees are often in a better position to understand the best way to advance those values.”).

²⁷⁸ But see generally Ridgway, *Toward a Less Adversarial Relationship Between Chevron and Gardner*, *supra* note 9 (discussing the tension between veteran friendliness and agency deference).

what is reasonable provide guidance on a case-by-case basis, but do not amend or supplant the legal standard itself.²⁷⁹ Thus, rather than adopting legal rules or tests to determine the scope of claims, the Veterans Claims Court makes a normative or partially normative decision regarding the VA claims adjudicator's judgment of what issues were reasonably raised.²⁸⁰ Therefore, the standard of reasonableness is used as a decision-guiding device by VA adjudicators in that what is "reasonable" is defined pursuant to the Veterans Claims Court's normative decisions.

As modeled above, the Veterans Claims Court has developed a normatively defined standard of reasonableness that would provide guidance to VA adjudicators on how to determine the scope of claims.²⁸¹ Although *Myers* first provided a general standard of reasonableness to determine the scope of a claim, what determines what is reasonably raised in a claim depends on the claimant's intent.²⁸² Further, the intent of the claimant is determined differently depending on whether the case involves a claim for benefits or a claim for increased benefits.²⁸³ As discussed below, to ascertain the scope of a claim, the person in whose shoes the veterans claims adjudicator must step, depends on the type of claim.

2. In Claims for Benefits, The Reasonable Person Is the Lay Claimant

²⁷⁹ See Zipursky, *supra* note 44, at 2148; see also Allen, *The United States Court of Appeals for Veterans Claims at Twenty*, *supra* note 25, at 373; Allen, *Significant Developments*, *supra* note 59, at 515–17 (discussing the use of single-judge decisions as corrections for agency decision-making rather than lawmaking); Ridgway, Stichman, & Riley, *supra* note 89 (discussing the prevalent use of nonprecedential single-judge decisions by the Court).

²⁸⁰ See, e.g., Zipursky, *supra* note 44, at 2148.

²⁸¹ See *supra* Part II.B.

²⁸² See *Criswell v. Nicholson* 20 Vet. App. 501, 504 (2006); see also *Clemons v. Shinseki* 23 Vet. App. 1, 5 (2009) (citing *Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007)).

²⁸³ For example, in a claim for benefits, the adjudicator must determine whether the claimant intended to seek benefits for certain symptoms. See *Clemons v. Shinseki* 23 Vet. App. 1, 5 (2009). On the other hand, in a claim for increased benefits, the adjudicator must assume that the claimant seeks the maximum benefits under law. See *AB v. Brown*, 6 Vet. App. 35, 38-39 (1993).

In claims for benefits, what is reasonably raised depends on the intent of the lay claimant, and the interpretation of the lay claimant's intent is based in part on whether the claimant is pro se or represented by counsel before the agency.²⁸⁴ The Veterans Claims Court in *Massie* provided guidance that the Board has discretion to take into account advice of counsel in determining the scope of claims.²⁸⁵ Arguably, this discretion is allowed for review of evidence that was submitted during the pendency of the appeal when the claimant is represented by counsel. Further, VA's duty to sympathetically read claims and determine whether issues are reasonably raised by the record is not abrogated at any point during the pendency of the claim or limited for the first part of the claim's pendency when the claimant did not have counsel and, arguably, regardless of whether counsel reviewed the entire claims file.²⁸⁶

This is because claimants are not represented by attorneys at the initial filing of a claim,²⁸⁷ and the duty to sympathetically read filings attaches from the date an informal or formal claim is filed.²⁸⁸ Furthermore, claims are rarely tailored from the start to withstand appellate scrutiny.²⁸⁹ Additionally, it would be contrary to the interest of preserving a non-adversarial and informal system to adopt a new standard that is harsher for claimants who had an attorney at

²⁸⁴ See *Massie v. Shinseki*, 25 Vet. App. 123, 129 (2011); see also *Clemons v. Shinseki* 23 Vet. App. 1, 5 (2009) (citing *Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007)).

²⁸⁵ See *Massie v. Shinseki*, 25 Vet. App. 123, 129 (2011).

²⁸⁶ See generally Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys In Cases Before VA: The "New Paternalism,"* 1 VETERANS L. REV. 2 (2009).

²⁸⁷ See 38 U.S.C. § 5904(c) (2000) (explaining that an attorney may enter an appearance and charge fees for representation after a notice of disagreement is filed in a claim); see also Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys In Cases Before VA: The "New Paternalism,"* 1 VETERANS L. REV. 2 (2009) (discussing the history of involvement of attorneys in the veterans claims system).

²⁸⁸ See 38 U.S.C. § 5103A.

²⁸⁹ See Ridgway, *Why So Many Remands*, *supra* note 7, at 133.

some point before VA, but not at all times during the pendency of the claim.²⁹⁰ It seems apparent that there will always be at least some period of time during the pendency of the claim in which VA must put themselves in the shoes of the pro se lay claimant.²⁹¹

3. In Claims for Increased Benefits, The Reasonable Person Is the Veterans Claims Adjudicator with Encyclopedic Knowledge of the Law

In claims for entitlement to increased benefits, where the claimed disability is already service-connected, the veteran²⁹² seeks an increase in benefits for that disability.²⁹³ Veterans have long been presumed to seek the maximum rating and all the available ratings provided by law, unless there is an express indication of an intent by the claimant to limit a claim or appeal to the issue of entitlement to a particular disability rating which is less than that maximum disability rating allowed by law.²⁹⁴ Thus, there is no need for a veterans claims adjudicator to determine whether the veteran intends to seek entitlement to certain benefits that may be raised as part and parcel of a pending claim for increased benefits.

This can be a very onerous standard for adjudicators. A claim for increased benefits may be initially submitted and characterized in different ways. Many claims for entitlement to

²⁹⁰ See Allen, *Veterans' Benefits Law 2010-2013*, *supra* note 253, at 19 (“[I]f one adopts the view that the failure to include a certain theory of entitlement can be assumed to be the result of a conscious attorney choice, it is difficult to see what is left of the canon of sympathetic reading in cases in which veterans have legal representation.”).

²⁹¹ See generally *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 323–24 (1985) (“A necessary concomitant of Congress’ desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. . . . The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal.”).

²⁹² Here, the claimant is referred to as “veteran” because when a claimant has a disability that is granted entitlement to service connection, the claimant is entitled to veteran status, regardless of whether his or her service was active duty. See 38 U.S.C.A. §§ 101(10), (23), (24) (West 2015); 38 C.F.R. §§ 3.1(d), 3.6 (2015).

²⁹³ See, e.g., *Rice v. Shinseki*, 22 Vet. App. 447, 453 (2009).

²⁹⁴ See *AB v. Brown*, 6 Vet. App. 35, 38-39 (1993); see also *Floyd v. Brown*, 9 Vet. App. 88, 102 (1996) (Steinberg, J., dissenting) (applying the presumption that claimants are seeking the maximum rating to extra scheduler ratings).

increased benefits are initially characterized by the claimant and/or the veterans claims adjudicator as a “claim for entitlement to an increased rating,” in which the veteran argues that the current evaluation, or currently assigned disability rating, for his condition does not accurately depict the severity of his condition and/or that his condition has worsened.²⁹⁵

In these cases, the veteran desires an increase in the monthly payments he receives, which are calculated based on his disability rating(s) that are assigned pursuant to thousands of diagnostic codes used to rate physical and mental disabilities.²⁹⁶ Furthermore, the issue of entitlement to an evaluation not contemplated by the Schedule for Rating Disabilities may also be reasonably raised.²⁹⁷ To further complicate matters, if a notice of disagreement is submitted against a decision to deny entitlement to TDIU, and the issue of entitlement to an increased rating is reasonably raised by the record, the issue of entitlement to an increased rating is to be inferred as part and parcel of the claim for increased benefits.²⁹⁸

In addition to benefits based on disability ratings, there are other types of benefits that may be available and that may be reasonably raised in a claim for entitlement to increased benefits.²⁹⁹ Furthermore, to provide guidance as to whether any such issues are inferable as a component of a pending claim for increased benefits, the judiciary has provided complex

²⁹⁵ *See, e.g., Akles v. Derwinski*, 1 Vet. App. 118 (1991) (Veteran submitted a claim for increased rating for testicular disability; Veterans Claims Court held that special monthly compensation was an issue that is part and parcel of the claim for increased rating).

²⁹⁶ *See* 38 C.F.R. Part 4 (2008) (providing the Schedule for Rating Disabilities). This Article will not discuss the rules governing the assignment of disability ratings under the schedular criteria or on an extraschedular basis.

²⁹⁷ *See Floyd*, 9 Vet. App. at 102 (Steinberg, J., dissenting); *see also Johnson v. McDonald*, 762 F.3d 1362 (2014).

²⁹⁸ *See* M21-1 IV.ii.2.F.2.m, “Identifying Reasonably Raised Claims of IU” (providing that when the veteran filed a notice of disagreement with a denial of TDIU and subsequently claims that a service-connected disability not on appeal precludes employability and the rating decision fails to increase the evaluation to the maximum rating provided by the Schedule, that previous non-pending disability will also be considered in appellate status).

²⁹⁹ *See* 38 C.F.R. § 3.155(d) (2015); *see generally* Title 38 of the United States Code.

procedural guidelines as to when issues of entitlement to benefits such as TDIU³⁰⁰ and SMC³⁰¹ are raised.

As discussed above, the issue of entitlement to TDIU is part and parcel of an increased benefits claim and should be inferred in a claim for increased benefits when expressly raised by the veteran or when the record reasonably raises the issue of TDIU.³⁰² The determination as to whether the record reasonably raises the issue of TDIU is based on whether there is “cogent evidence of unemployability” in the record, or whether the criteria set for in 38 C.F.R. § 4.16(a) are met and there is current evidence of unemployability due to service-connected disabilities.³⁰³

Although a TDIU “is merely an alternate way to obtain a total disability rating without being rated 100% disabled under the Rating Schedule,”³⁰⁴ the issue of entitlement to a TDIU is not necessarily rendered moot if a veteran’s multiple service-connected disabilities are already rated at a combined 100 percent.³⁰⁵ The veteran may still be entitled to TDIU (or other additional

³⁰⁰ Like compensation based on disability ratings, TDIU is a monthly monetary payment. *But see* Rice v. Shinseki, 22 Vet. App. 447, 452 (2009). However, the court opined:

Rather than including those qualifications in the rating schedule, VA has provided for this means of achieving a total disability rating in a separate regulation because it potentially applies to all disabilities, or, in some cases, combinations of those disabilities. Further, the rating schedule is based on the ‘average impairment in earning capacity caused by a disability,’ whereas entitlement to TDIU is based on an individual’s particular circumstance.

(quoting Thun v. Peake, 22 Vet. App. 111, 116 (2008)).

³⁰¹ Like compensation based on disability ratings, SMC is a monthly monetary payment. However, SMC is paid as compensation “above and beyond” the level of functional impairment contemplated by the scheduler diagnostic codes and is meant to compensate for loss of quality of life that is generally permanent.

³⁰² *See* Rice v. Shinseki, 22 Vet. App. 447, 450–55 (2009) (in pending claim for entitlement to an increased initial rating, the issue of TDIU is part and parcel of the claim for benefits and not a freestanding claim); *see also* 38 C.F.R. § 3.155(d) (2015); M21-1 IV.ii.2.F.2.m, *Identifying Reasonably Raised Claims of IU*.

³⁰³ *See* Rice, 22 Vet. App. at 453 (citing Comer v. Peake, 552 F.3d 1362, 1367 (Fed.Cir.2009); *see also* Roberson v. Principi 251 F.3d 1378, 1384 (Fed. Cir. 2001)).

³⁰⁴ Norris v. West, 12 Vet. App. 413, 420–21 (1999).

³⁰⁵ *See* Bradley v. Peake, 22 Vet. App. 280, 291 (2008).

compensation such as SMC) if one service-connected disability alone can constitute the basis for a grant of TDIU at any point during the appeal period.³⁰⁶ Furthermore, whenever a veteran has a total disability rating, schedular, or extraschedular, and is subsequently awarded service connection for any additional disability or disabilities, VA has a duty to assess all of the claimant's disabilities without regard to the order in which they were service-connected to determine whether any combination of the disabilities establishes entitlement to increased benefits.³⁰⁷

Also, as discussed above, the issue of entitlement to SMC is part and parcel of an increased benefits claim and should be inferred in a claim for increased benefits when the record reasonably raises the issue of SMC.³⁰⁸ There are multiple types of SMC, and each is based on specific criteria for entitlement.³⁰⁹ Furthermore, each type of SMC can have different levels that provide for relatively greater amounts of compensation, thus further complicating the determination of exactly which type or types of SMC have been reasonably raised by the record.³¹⁰ Adjudicators must also determine the highest level of a certain SMC type that is raised.³¹¹ Thus, in claims where different levels of SMC are reasonably raised, each level of

³⁰⁶ *See id.* at 293.

³⁰⁷ *See* *Buie v. Shinseki*, 24 Vet. App. 242, 250 (2010).

³⁰⁸ *See* 38 C.F.R. § 3.155(d) (2015); *see also* *Bradley*, 22 Vet. App. at 294 (“[SMC] benefits are to be accorded when a veteran becomes eligible without need for a separate claim.”); *Beverly v. Nicholson*, 19 Vet. App. 394, 405–06 (2005) (in determining the existence of the Court’s jurisdiction “turns on whether the [SMC for aid and attendance] claim was reasonably raised to the Board”); *Akles v. Derwinski*, 1 Vet. App. 118 (1991) (holding that SMC is part and parcel of a claim for increased compensation is therefore an inferred issue).

³⁰⁹ *See* 38 U.S.C. § 1114; *see also* 38 C.F.R. § 3.350.

³¹⁰ *See id.*

³¹¹ *See, e.g.*, 38 C.F.R. § 3.350(f)(3), (f)(4) (showing that SMC for aid and attendance is a greater benefit than SMC based on housebound criteria, and each requires satisfaction of different criteria). Therefore, both issues may be raised as components of a pending claim for increased benefits. This referred to as a “half step” increase. *Bresiner v. Shinseki*, 25 Vet. App. 64, 67 (2011).

SMC should be inferred so as to allow the veteran the opportunity to receive the maximum level of benefits.

To illustrate a situation in which the Veterans Claims Court has determined that the issue of SMC loss of use was reasonably raised, in *Lawrence v. Nicholson*,³¹² the Veterans Claims Court relied on the rule that “a claimant presenting such a claim is presumed to be seeking the highest possible rating.”³¹³ The Veterans Claims Court found that the issue of SMC for loss of use of the bilateral lower extremities was raised by the record and that the Board failed to address whether the issue of SMC was raised when the evidence showed a medical evaluation that the claimant had “progressively lost the ability to ambulate” and did not have “normal use” due to her symptoms.³¹⁴ The Veterans Claims Court remanded the matter of SMC to the Board to resolve in the first instance.³¹⁵

Even when the Board has made an express determination that the issue of SMC loss of use is not raised, that determination may not withstand appellate scrutiny. In *Hopper v. Nicholson*,³¹⁶ the Veterans Claims Court found that the issue of SMC for loss of use of the bilateral lower extremities was raised by the record and that the issue should have been considered by the Board when the evidence of record showed that the appellant was able to ambulate only short distances with a walker and that, even with a walker, the appellant experienced problems with “balance” and “propulsion.”³¹⁷ The Veterans Claims Court further

³¹² 23 Vet. App. 504 (Table), 2007 WL 1672411 (2007).

³¹³ *Id.* at *2 (quoting *Floyd v. Brown*, 9 Vet. App. 88, 102 (1996)) (internal quotation marks omitted).

³¹⁴ *Lawrence*, 23 Vet. App. at *1 (internal quotation marks omitted).

³¹⁵ *See id.* at 3.

³¹⁶ 24 Vet. App. 197 (2007) (disposition published in reporter table).

³¹⁷ *Id.* at 3.

stated, “[t]he Board’s vague statements that ‘the veteran’s symptomatology is not commensurate with the loss of use of his bilateral legs’ and that ‘[h]e can ambulate, albeit with assistive devices’ cannot be deemed an explicit finding that SMC was not warranted.”³¹⁸ The Veterans Claims Court found that the Board’s findings of fact were too vague and remanded the matter for the Board to resolve in the first instance.³¹⁹

It is apparent that the standard required to determine whether issues are reasonably raised as part and parcel of a claim for increased benefits is generous for the claimant. However, the analysis for determining the scope of the claim can be quite onerous for the veterans claims adjudicator. Notably, this level of analysis is required to make the determination as to what is reasonably encompassed in a claim for increased benefits, and such determinations can merely trigger VA’s duty to assist in the full development of those issues. At this point in the analysis, the veterans claims adjudicator has not even begun to adjudicate entitlement to these benefits on the merits. Given the thousands of diagnostic codes that may apply for a disability rating and the multitude of other regulations that set forth distinct, oftentimes intertwined, criteria for entitlement to ancillary benefits, adjudication requires encyclopedic knowledge of veterans law to determine which issues have been reasonably raised by the record as part of a pending claim for increased benefits, regardless of how much training or years of experience the adjudicator has.

³¹⁸ *Id.* at 4.

³¹⁹ *See id.* at 4.

4. The Reasonable Person for Purposes of Determining Whether There Is an Implicit Denial in a Claim for Component in a Claim

The implicit denial doctrine predominantly borrows strategies from the Nash equilibrium that encompasses the doctrine governing the determination as to the scope of claims and claims for increased benefits.³²⁰ In *Cogburn*, The Veterans Claims Court directly relied on *Ingram* when it provided the factor of determining whether there is an implicit denial pursuant to a standard of reasonableness,³²¹ and as discussed above, *Ingram* relied on precedent pertaining to the standards governing the determination as to the scope of claims.³²²

Interestingly, however, the Veterans Claims Court quoted Black's Law Dictionary's definition of a "reasonable person," which relies on a definition from tort law.³²³ However, tort law's definition of the reasonable person is not derived from a normative definition of what is reasonable within the institutional lens of veterans benefits administration. Further, Black's Law Dictionary is intended to provide a comprehensive overview of the entire body of American jurisprudence,³²⁴ and at least one commentator has criticized the import of this definition

³²⁰ See *supra* Part II.C.

³²¹ See *Cogburn v. Shinseki*, 24 Vet. App. 205, 216 (2010), *aff'd*, *Cogburn v. McDonald*, 809 F.3d 1232 (2016).

³²² See *Ingram v. Nicholson*, 21 Vet. App. 232, 238–39 (2007).

³²³ *Cogburn*, 24 Vet. App. at 216 (2010) (quoting BLACK'S LAW DICTIONARY 1380 (9th ed. 2009) (quoting R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 56 (17th ed. 1977)). The Veterans Claims Court explained:

The reasonable man connotes a person whose notions and standards of behavior and responsibility correspond with those generally obtained among ordinary people in our society at the present time, who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equable. He is not necessarily the same as the average man—a term which implies an amalgamation of counter-balancing extremes.

See also Zipursky, *supra* note 44.

³²⁴ See Bryan A. Garner, *Preface to the First Pocket Edition of BLACK'S LAW DICTIONARY*, reprinted in BLACK'S LAW DICTIONARY vii (3d Pocket ed. 2006) ("Henry Campbell Black's dictionary took the field and became incontestably supreme, partly because of his comprehensiveness, partly because of his academic standing, and partly because he had the good fortune of publishing his work with West Publishing Company.").

specifically to veterans law, given that this description of the reasonable person “may bear little resemblance to many of the veterans seeking compensation, especially those suffering from various forms of mental illness.”³²⁵

This Article posits that the reasonable person here directly tracks the normative definition provided in the context of determining the scope of claims for benefits and claims for increased benefits, given that the doctrine of implicit denial tracks prior precedent regarding the same. Further, as discussed above, the use of the concept of reasonableness in veterans law is derived from normative definitions developed on a case-by-case basis, and the reasonable person is not based on an individual with certain secondary qualities deemed as the public norm, as is the case in tort law.³²⁶

Further, although the Veterans Claims Court in *Cogburn* separated the factor of whether the claimant is presented by counsel from the determination of whether the claimant would reasonably have inferred that his or her claim was denied, the Veterans Claims Court specifically relied on *Massie* in its guidance that “whether a claimant is represented is particularly relevant to what disability was initially claimed and how any decision based on the implicit denial doctrine is interpreted.”³²⁷ The Veterans Claims Court in *Massie* provided that the fact that a claimant was represented by counsel before the agency is relevant to determining whether a matter is reasonably raised by the record.³²⁸ It seems that the Veterans Claims Court in *Cogburn* separated out this factor to lend further clarity to its guidance, and that doing so does not actually change

³²⁵ Allen, *Veterans’ Benefits Law 2010-2013*, *supra* note 253, at 55–56.

³²⁶ See Zipursky, *supra* note 44 at 2143; *supra* at Part I.A.

³²⁷ *Cogburn*, 24 Vet. App. at 217 (2010).

³²⁸ See *Massie v. Shinseki*, 25 Vet. App. 123, 129 (2011).

the import of the standard of reasonableness from the doctrine governing the determination as to the scope of claims to the standard of reasonableness used in the implicit denial doctrine.

B. Tying Up Loose Ends in the Game's Progress

1. Guidance Needed as to Whether to Infer Issues of Entitlement to Ancillary Benefits Other Than TDIU and SMC

Under the new regulations, issues of entitlement to all ancillary benefits other than TDIU and SMC are also part and parcel of an increased benefits claim and should be inferred in a claim for increased benefits when the record raises these issues.³²⁹ Such other ancillary benefits include Dependents' Educational Assistance under 38 U.S. Code Chapter 35;³³⁰ Specially Adapted Housing Grants, which allow veterans with certain disabilities such as amputations or paralysis to purchase or renovate a barrier-free home;³³¹ Special Home Adaptation Grants, which help blinded veterans or those with upper-extremity handicaps to renovate a home;³³² and Automobile and Other Conveyance and Adaptive Equipment Allowance.³³³

However, given that there is no case law in the same vein as *Rice* and *Akles* regarding when these types of benefits are inferable, it is unclear whether the same reasonable standard for

³²⁹ See 38 C.F.R. § 3.155(d) (2015) (“Once VA receives a complete claim, VA will adjudicate as part of the claim entitlement to any ancillary benefits that arise as a result of the adjudication decision (e.g., entitlement to 38 U.S.C. Chapter 35 Dependents' Educational Assistance benefits . . . entitlement to adaptive automobile allowance, etc.). The claimant may, but need not, assert entitlement to ancillary benefits at the time the complete claim is filed. VA will also consider all lay and medical evidence of record in order to adjudicate entitlement to benefits for the claimed condition”); see also M21-1 Part III.iv.6 § B.2.a, *Types of Ancillary Benefits*; M21-1 Part III.iv.6 § B.2.b, *When to Address Subordinate Issues and Ancillary Benefits*.

³³⁰ See 38 U.S.C. §§ 3500–66.

³³¹ See § 2101(a).

³³² See § 2101(b).

³³³ See § 3901 (For example, the Department of Veterans Affairs provides a one-time financial assistance grant of \$18,900 to eligible veterans toward the purchase of a new or used automobile to accommodate a veteran or service member with certain service-connected disabilities).

inferring issues as part and parcel of a claim for increased benefits applies. Further, these types of benefits are not monthly compensation benefits like the payments received pursuant to disability ratings, TDIU, and SMC.³³⁴ Therefore, it is unclear whether the presumption of intent to seek maximum benefits under *AB v. Brown* may be applied to benefits such as Specially Adapted Housing Grants. This is because the holding in *AB v. Brown* pertained to issues of entitlement to increased evaluation for the claimed disability (i.e., increased monthly compensation) and did not address non-recurrent subsidies or one-time payments.³³⁵

2. The Noncooperative Strategy in Delisio and a Suggestion for Making Up for Lost Payoffs

Although the holding in *Delisio* has broader application than was likely intended,³³⁶ the holding is a defection from the cooperative game, and defections in Nash equilibrium attain lower payoffs than in games where both players mutually cooperate.³³⁷ As discussed above, in a strategy to attain payoffs for the interest of ensuring an informal and nonadversarial claims system, the Veterans Claims Court in *DeLisio* held that when there is a pending claim for service connection, if the record reasonably indicates that the cause of the claimed disability is another disease or disability that may be associated with service, VA must investigate whether that causal disease or disability is related to service to determine whether the claimed disability may be service-connected on a secondary basis.³³⁸ No additional filing would be necessary to initiate

³³⁴ See § 2102(d)(3).

³³⁵ See *AB v. Brown*, 6 Vet. App. 35, 36 (1993).

³³⁶ See generally Jenny J. Tang, *Getting to the Root of It: Broadening the Scope of Claims after Delisio v. Shinseki*, 7 VETERANS L. REV. 73 (2015) (providing a detailed review of the facts in the case).

³³⁷ See Sethi, *supra* note 23, at 541.

³³⁸ See *Delisio v. Shinseki*, 25 Vet. App. 45, 54 (2011).

a claim for service connection for that causal disease or disability.³³⁹ Thus, a new claim for service connection for a causal disability may be inferred in a claim for service connection for a secondary disability.³⁴⁰

Although the Veterans Claims Court clearly aimed to serve the interest of maintaining an informal and nonadversarial veterans claims adjudication system, the Veterans Claims Court's decision did not adhere to long-established precedent that provides that a submission can only be read as a claim for benefits if the submission demonstrates the claimant's intent to seek benefits for the identified symptoms or disability.³⁴¹ Instead, it appears that the Veterans Claims Court in *Delisio* construed a claim for service connection as a theory of entitlement that may be reasonably raised as a component of a claim for benefits.³⁴² This is apparent because the Veterans Claims Court expressly relied on cases in which a claim for service connection was pending and a theory of entitlement was raised as part of the claim.³⁴³ It also relied on a case that determined when VA's duty to assist the claimant is triggered in a pending claim.³⁴⁴ Significantly, however, the facts in *Delisio* are distinguishable from such cases because the issue was whether a claim for service connection was pending at all.

³³⁹ See *id.* (citing *Clemons v. Shinseki*, 23 Vet. App. 1, 5 (2009) (holding that a claim for benefits "may reasonably be encompassed by several factors, including . . . information . . . that the Secretary obtains in support of the claim")); but see *Clemons*, 23 Vet. App. at 7 ("Similarly, a different result is reached when the evidence supports the service connection of a disability, but there is no indication the claimant was seeking benefits for that disability or the symptoms he was experience that are associated with that disability.").

³⁴⁰ See *Delisio*, 25 Vet. App. at 47.

³⁴¹ See, e.g., *Brokowski v. Shinseki*, 23 Vet. App. 79, 84 (2009); *Criswell v. Nicholson* 20 Vet. App. 501, 503 (2006); *Brannon v. West*, 12 Vet. App. 32, 35 (1998).

³⁴² See *Delisio*, 25 Vet. App. at 53.

³⁴³ See *Delisio*, 25 Vet. App. at 54 (citing *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000); see also *Roper v. Nicholson*, 20 Vet. App. 173, 179 (2006)).

³⁴⁴ See *Delisio*, 25 Vet. App. at 54 (citing *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006)).

i. Applying Delisio to Other Sets of Facts

The Board has applied the *Delisio* holding to cases with analogous facts.³⁴⁵ *Delisio* included a claim for service connection for the secondary disability that was pending.³⁴⁶ The evidence in *Delisio* included competent evidence to support a determination that the claimed pending disability was secondary to an unclaimed causal disability, and there was some competent evidence that the claimant had the causal disability during the appeal period.³⁴⁷ Furthermore, there was some indication that the causal disability in *Delisio* may be associated with service, because it was subject to a presumption of service connection based on service in the Republic of Vietnam.³⁴⁸ However, given *Delisio*'s broad holding, adjudicators may have to apply the *Delisio* rule to much broader facts than shown in *Delisio* without any available mechanisms for obtaining medical evidence in the case to support any determination to infer a claim for service connection for a causal disability.

First, even if there is medical evidence to show a causal relationship between the pending secondary disability and a causal disability and there is some indication that the causal disability may be associated with service, the broad holding in *Delisio* leaves open the question of whether a claim for service connection for that causal disability is reasonably raised if, during the pendency of the claim, there is no competent evidence of a diagnosis for that causal disability and there does not seem to be lay evidence of symptoms of that causal disability. The caveat to applying the holding to this situation is that the claimant may not have made any indication that

³⁴⁵ See, e.g., No 10-10 838, 2013 WL 3767836 (Vet. App. May 8, 2013); No 13-14 888, 2015 WL 3531645 (Vet. App. April 23, 2015).

³⁴⁶ See *id.*

³⁴⁷ See *id.*

³⁴⁸ See *id.*

he desires benefits for a specific set of symptoms shown in the record, and there is no way for the veterans claims adjudicator to tell if any set of symptoms shown in the record may be attributable to the causal disability.³⁴⁹

Second, the Veterans Claims Court did not provide specific guidance for determining when the record reasonably indicates that the claimed disability is secondary to another disability that is not currently pending.³⁵⁰ Notably, in claims for service connection for a pending disability, it is up to the medical examiner to consider the veteran's medical history and observations, including all disabilities in the chain of causation, in rendering a medical opinion as to whether the pending disability is etiologically related to service.³⁵¹

Indeed, the holding in *Delisio* suggests that disabilities that are shown by the evidence to be within the chain of causation should be adjudicated in separate claims for service connection.³⁵² Therefore, each claim would be afforded due process protections and appellate review, regardless of whether the claimant seeks benefits for those causal disabilities. Furthermore, the Veterans Claims Court in one unreported case indicates that this reasonableness standard may not even require medical evidence, and that the claimant's lay argument as to a

³⁴⁹ The Court in *Clemons* expressly distinguished situations where the scope of a claim would not be expanded to include more diagnoses, including cases “when the evidence supports the service connection of a disability, but there is no indication the claimant was seeking benefits for that disability or the symptoms he was experiencing that are associated with that disability.” *Clemons v. Shinseki*, 23 Vet. App. 1, 7 (2009) (citing *Criswell v. Nicholson*, 20 Vet. App. 501, 504 (2006) (“[W]here there can be found no intent to apply for VA benefits, a claim for entitlement to such benefits has not been reasonably raised.”)).

³⁵⁰ See *Delisio*, 25 Vet. App. at 54.

³⁵¹ A medical opinion is adequate when it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's “evaluation of the claimed disability will be a fully informed one.” *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994) (quoting *Green v. Derwinski*, 1 Vet. App. 121, 124 (1991)).

³⁵² See *Delisio*, 25 Vet. App. at 54.

causal relationship alone is sufficient to show that the record reasonably indicates such a disability caused the claimed disability.³⁵³

Third, although the facts in *Delisio* had a causal disability that was presumed service-connected, the Veterans Claims Court in *DeLisio* provided no guidance for determining whether a causal disability “may be associated with service” in cases where there is competent evidence to indicate that the pending disability is secondary to the causal disability and where there is competent evidence of the causal disability during the appeal period.³⁵⁴ Although a lay statement to the effect that the “causal disability” started in service may suffice, the import of this holding in cases where there is no such argument is unclear where the competent medical evidence of record does not indicate that the current causal disability may be associated with service.³⁵⁵

Given that there is no possibility that a claim for service connection can succeed without a current disability, it would be unreasonable by any standard to infer a claim for service connection without any indication of a current disability.³⁵⁶ Further, because there is no possibility that a claim for service connection can succeed without a causative relationship between the pending disability and the “causal” disability, it would be unreasonable by any standard to infer a claim for service connection without any indication that the “causal” disability

³⁵³ See *Clark v. Shinseki*, No. 10-1892, 2012 WL 432280 (Vet. App. Feb. 13, 2012) (Veteran complained of neurological symptoms involving the left arm. The record showed on examination for a neurological disability, the Veteran was diagnosed with cervical radiculopathy. The Veteran contended that these symptoms may be attributed to degenerative disc disease of the cervical spine, which was not pending before the Board. On appeal, the Board found that “there is no basis to attribute these symptoms to a separate disability.” However, the Court noted that “the appellant himself related his left arm condition to his cervical spine condition.” Because the Veteran argued that the cervical spine disability causes his left arm neurological symptoms, the Court concluded that the evidence indicates that the left arm condition may be related to the causal cervical spine disability).

³⁵⁴ See *Delisio*, 25 Vet. App. at 55.

³⁵⁵ At this point, VA would have assisted the claimant in the development of the pending claim for the secondary disability and would not necessarily have obtained the complete medical records relevant to the “causal” disability.

³⁵⁶ See *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992).

caused the pending disability.³⁵⁷ Furthermore, given that there is no possibility that a claim for service connection can succeed without a nexus between a current disability and service or a presumption of service connection for such disability, it would be unreasonable by any standard to infer a claim for service connection without any indication that the causal disability was incurred in service.³⁵⁸

ii. Suggested Mechanism to Secure Independent Medical Evidence

Problematically, however, the determinations of whether there is a current disability, whether a disability caused another disability, and whether a disability is etiologically related to service, are generally medical questions.³⁵⁹ Accordingly, it appears that some amount of medical conjecture by the veterans claims adjudicator could be required when determining whether, in a pending claim for service connection, “information obtained reasonably indicates that the claimed condition is *caused* by a disease or other disability that may be associated with service.”³⁶⁰

Although the determination as to whether the record reasonably raises a claim for service connection for a causal disability and includes consideration of essentially medical questions, the *Delisio* holding, when broadly applied, seems to require a veterans claims adjudicator to make those medical conjectures in order to determine whether a claim for service connection for causal

³⁵⁷ See *Allen v. Brown*, 7 Vet. App. 439, 448 (1995) (establishing service connection on a secondary basis requires evidence sufficient to show (1) that a current disability exists and (2) that the current disability was either (a) proximately caused by or (b) proximately aggravated by a service-connected disability.).

³⁵⁸ See generally 38 U.S.C. §§ 1110, 1131; see, e.g., *Shedden v. Principi*, 381 F.3d 1163, 1167–67 (Fed. Cir. 2004) (providing the elements of service connection).

³⁵⁹ See *Jandreau v. Nicholson*, 492 F.3d 1372, 1376 (2007); see also *Wagner v. Principi*, 370 F.3d 1089, 1093–96 (Fed. Cir. 2004) (explaining that also, in determining if a causal disability “may be associated with service,” there may arise the medical question as to whether such disability pre-existed service, and if so, if the disability was aggravated in service.).

³⁶⁰ *Delisio v. Shinseki*, 25 Vet. App. 45, 54 (2011) (emphasis in original).

disability is reasonably raised by the record. However, by law, adjudicators at the ROs and at the Board lack the medical expertise to resolve these medical questions and are required to base their decisions on independent medical evidence.³⁶¹

Furthermore, VA's duty to assist the claimant in substantiating his or her claim, which includes unrestricted authority to obtain medical opinions, is only triggered for "claims" or "applications" before VA.³⁶² Yet, the *Delisio* rule tracks language in and relies on cases that provide guidance as to when the duty to assist is triggered in order to substantiate a pending claim on the merits.³⁶³ Though it is true that the duty to assist by obtaining medical evidence is triggered when there is an "indication" of a relationship between the current disability and service, and competent medical evidence is not needed to trigger this duty,³⁶⁴ this standard does not apply to the exercise of determining whether VA can infer an entirely new claim for service connection.³⁶⁵

Thus, there is no mechanism for a veterans claims adjudicator to obtain independent medical evidence (e.g., obtaining a VA medical examination or opinion) to answer the medical questions discussed above to determine whether to infer a claim for service connection in a

³⁶¹ See *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991).

³⁶² 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159; *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006). See generally *Ridgway, The Veterans' Judicial Review Act Twenty Years Later*, *supra* note 4, at 272-73 ("the VJRA indirectly caused the separation of legal and medical expertise within the system, and required the development of a robust duty to assist to reconnect these halves."); James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B. J. 405, 408-11 (2009) (discussing the role of medical evidence in VA adjudication after *Colvin*).

³⁶³ See *Delisio*, 25 Vet. App. at 53.

³⁶⁴ See *Allen, Veterans' Benefits Law 2010-2013*, *supra* note 253, at 44-46 (discussing how there is no need for competent evidence for there to be an indication that triggers the duty to assist in obtaining medical evidence).

³⁶⁵ See *id.* at 57-58.

pending claim for service connection.³⁶⁶ In order to allow adjudicators some mechanism to obtain such medical evidence to determine whether to infer a claim for service connection for a causal disability, this Article suggests that the Veterans Claims Court provide guidance similar to that in *Shade v. Shinseki*.³⁶⁷ This case provides that, in an application to reopen a prior denied claim for service connection, evidence or information in a claims file raises a reasonable possibility of substantiating the claim and is therefore material if the evidence triggers VA's duty to assist.³⁶⁸

C. Observations Regarding the Outcomes of the Game and a Proposal to Abandon the Game to Invent a Global Optimum

On review, it appears that the outcome of the game of developing judicial doctrine governing the scope of claims is one in which the interest of maintaining an informal and nonadversarial veterans claim adjudication system has ended up with significantly more payoffs, perhaps as a result of Nature's advantage gained during its moving first in the game (i.e., the VJRA's enactment).³⁶⁹ On the other hand, the Veterans Claims Court has also generally

³⁶⁶ See *Delisio*, 25 Vet. App. at 57. Interestingly, the *Delisio* rule for inferring claims seems more suited to the makeup of the Board prior to the VJRA, when the Board contained staff physicians and rendered three-person panel decisions that were adjudicated by both lawyers and doctors. See Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23, 24 (1994).

³⁶⁷ See 24 Vet. App. 110 (2010).

³⁶⁸ See *id.* at 123 (relying on *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006)). In claims for benefits, VA's duty to assist is triggered if the test provided in *McLendon* is met. *McLendon* provides that VA examination is necessary when there is competent evidence of a current disability or persistent or recurrent symptoms thereof; establishment of an in-service event, injury or disease; and indication that the current disability may be associated with an in-service event. This is a low standard. Thus, under *Shade*, evidence is material for purposes of reopening previously denied claims if there is any evidence that meets the standard under *McLendon*.

³⁶⁹ See *supra* Part II.A.1.

succeeded in increasing the quality of administrative decisions by VA.³⁷⁰ Further, the Veterans Claims Court's precedential opinions have contributed to "a growth in uniformity and predictability in the law concerning veterans' benefits" and have provided guidance to claims adjudicators throughout VA.³⁷¹

The judiciary has defined the reasonable standard generously, thereby providing decision-making guidance to VA claims adjudicators that the scope of a claim for benefits must be interpreted pursuant to the lay claimant's intent.³⁷² Further, the scope of a claim for increased benefits must be interpreted pursuant to the judgment of a veterans claims adjudicator with encyclopedic knowledge of veterans law, which is quite generous for the claimant.³⁷³

However, as noted in Part I, even when a game is Pareto-optimal, there can be inefficiencies.³⁷⁴ The standards of reasonableness for determining the scope of a claim, although generous for claimants, may well be too onerous for agency decision-makers. At the RO level, claims adjudicators are not attorneys, but they have the responsibility of noticing and developing every reasonably raised issue and theory of entitlement that is part and parcel of a pending claim.³⁷⁵ This is particularly difficult for the claims adjudicators who must employ encyclopedic

³⁷⁰ See Allen, *The United States Court of Appeals for Veterans Claims at Twenty*, *supra* note 25, at 376. On the other hand, the Court has been criticized as being more a "mere corrector of Board decisions in individual cases" rather than serving as a lawmaker. Allen, *The United States Court of Appeals for Veterans Claims at Twenty*, *supra* note 25, at 373.

³⁷¹ Allen, *The United States Court of Appeals for Veterans Claims at Twenty*, *supra* note 25, at 373.

³⁷² See *supra* Part III.A.2.

³⁷³ See *supra* Part III.A.3.

³⁷⁴ See *supra* Part I.D.

³⁷⁵ See *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004) (stating that VA has the responsibility of determining when an informal claim has been filed); see also *Ridgway, The Veterans' Judicial Review Act Twenty Years Later*, *supra* note 4, at 284. One commentator from the Board argued that the RO claims adjudicators focus on agency-created procedures found in internal agency policy manuals because they lack training in legal analysis. See

knowledge of veterans law to determine what has been reasonably raised as part of a claim for increased benefits, regardless of how many years of experience and training they have.³⁷⁶

Another consequence of the nonadversarial and pro-claimant duty to sympathetically develop claims to their optimum, as well as the generous reasonable standards for interpreting the scope of claims, is that the veterans claims adjudication system has “a very weak concept of abandonment.”³⁷⁷ Except for claims (and issues that are components of a claim) that are deemed implicitly denied, claims will remain pending if VA fails to adjudicate them to their optimum.³⁷⁸ Also, when a case is before the Veterans Claims Court, arguments for reversal are less likely to succeed than arguments identifying a procedural error, which then requires remand back to VA where the claimant can submit new evidence in hopes of eventually receiving a favorable decision.³⁷⁹ Accordingly, attorneys before the Veterans Claims Court tend to argue for remand by challenging VA’s failure to fully comply with all procedural mechanisms to ensure development of a claim to its optimum.³⁸⁰ Thus, the procedural whack-a-mole continues.

To address these unreasonable (i.e., not pro-claimant) outcomes of the game, Congress, veteran service organizations and advocates, and agency stakeholders have proposed programs

Jeffery Parker, *Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 210–12 (2009).

³⁷⁶ Indeed, ancillary benefits in claims for increased benefits such as SMC top the list of the most inaccurately processed issues at the ROs. See *Inspection of VA Regional Office Oakland, California*, OFFICE OF INSPECTOR GENERAL OVERSIGHT REPORTS (Dep’t of Veteran Affairs Feb. 11, 2016); see also *Inspection of VA Regional Office San Diego, California*, OFFICE OF INSPECTOR GENERAL OVERSIGHT REPORTS (Dep’t of Veteran Affairs Sept. 9, 2015); *Inspection of VA Regional Office Winston-Salem, North Carolina*, OFFICE OF INSPECTOR GENERAL OVERSIGHT REPORTS (Dep’t of Veteran Affairs Aug. 26, 2015).

³⁷⁷ Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later*, *supra* note 4, at 280–81.

³⁷⁸ See *Cogburn v. Shinseki*, 24 Vet. App. 205, 210 (2010); see also *Norris v. West*, 12 Vet. App. 413, 422 (1999); 38 C.F.R. § 3.160 (2015).

³⁷⁹ See Ridgway, *Fresh Eyes on Persistent Issues*, *supra* note 13, at 1039.

³⁸⁰ See *id.* at 1041–43.

and reforms to work around and mitigate the hamster wheel. Congress has responded by requisitioning independent reviews of the claims system since the passing of the VJRA.³⁸¹ However, since the passing of the Veterans Claims Assistance Act (“VCAA”), Congress has been more cautious about intervening with judicial review and about “tinkering” with the system.³⁸²

There is also hope by stakeholders that a proposed streamed-lined appeals procedure will mitigate delays in adjudication.³⁸³ Examples of proposed legislative reforms include the Board’s proposed amendment to 38 U.S. Code Chapter 71 to close the evidentiary record at the point an initial VA decision is issued with very limited exceptions.³⁸⁴ In April 2016, after roundtable discussions, VA released its 12 Breakthrough Priorities, which included the action item to “Develop a Simplified Appeals Process.”³⁸⁵ The proposed reform includes the implementation of a new system that protects the effective date while veterans consider options.³⁸⁶ This system provides three lanes of appeals processing: (1) Local Higher-Level Review (Difference of

³⁸¹ See Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later*, *supra* note 4, at 289 (noting that Congress has gained a new appreciation of how difficult it can be to translate abstract ideals into practice in such a complex yet informal system); see also Allen, *The United States Court of Appeals for Veterans Claims at Twenty*, *supra* note 25, at 384–85 (discussing the relationship between the Court and Congress, and Congress’s attempts to micromanage the Court’s judicial functions).

³⁸² See Ridgway, *The Veterans’ Judicial Review Act Twenty Years Later*, *supra* note 4, at 288–89.

³⁸³ See, e.g., Dep’t of Veterans Affairs, Budget in Brief 9 (2017) (“The 2017 Budget proposes a Simplified Appeals Process—legislation and resources . . . —that would provide Veterans with a simple, fair, and streamlined appeals process, in which they would receive a final appeals decision within 365 days from filing of an appeal by 2021.”); American Veterans, et al., *The Independent Budget for the 114th Congress* 10 (noting that “Congress should enact legislation to create a Fully Developed Appeals pilot program, modeled after the existing Fully Developed Claims program, one that would allow appellants to receive more timely decisions from the BVA if it agrees to a streamlined appeals process and accept responsibility for assembling new private evidence required to justify their appeals.”).

³⁸⁴ See VOLUME I SUPPLEMENTAL INFORMATION AND APPENDICES CONGRESSIONAL SUBMISSION 2017, 32 (2017).

³⁸⁵ *Hearing Before the S. Comm. On Veterans’ Affairs*, 1 (2016) (statement of Robert A. McDonald, Secretary, Dep’t of Veterans Affairs).

³⁸⁶ See Budget in Brief *supra* note 383, at 35.

Opinion), which is a quick, early resolution of disputed issues at the Agency of Original Jurisdiction or before appealing to the Board, *or* submit new evidence in supplemental claim; (2) New Evidence (Supplemental Claim), which allows claimants to submit new evidence and protects the effective date associated with their initial claim; and (3) Board Review, which allows for an appeal directly to the Board (after submission of a notice of disagreement), while bypassing the multiple, time-consuming layers of appellate review currently found in the Regional Office appeals process.³⁸⁷

However, when players are forced to play in an uncertain game (i.e., one in which legislation can make a move at any time after the first move), the outcome of the game and resulting payoffs for each player are much more difficult to model and predict. In the above reform scenarios, it would be difficult to evaluate the possible strategies for attaining further payoffs for the two interests of veterans law, given that it is unclear how such reforms will affect the duty to sympathetically read filings and develop a claim to its fullest.

This difficulty arises because when players face uncertainty in the game, modelers must specify how the players will evaluate their uncertain payoffs, which is an impossible task at this juncture.³⁸⁸ Indeed, not even the members of the Veterans Claims Court themselves can predict or evaluate the strategies they will employ as instruments of the interests of veterans law after legislative reform is implemented. Further, not only will workaround programs and legislative reform serve to cause uncertain payoffs in the game, certain reforms may even serve as a

³⁸⁷ The White House, Here's How the VA Is Partnering with Veterans Groups to Reimagine and Redesign the Appeals Process, <https://medium.com/@WhiteHouse/here-s-how-the-va-is-partnering-with-veterans-groups-to-reimagine-and-redesign-the-appeals-process-ed8b723937d2#.1raqqaqf7>.

³⁸⁸ See RASMUSEN, *supra* note 10, at 85. Unless a modeler takes the time to go through post-legislative reform hypotheticals with members on the Court and on the Federal Circuit, it would not be possible to model how the game will proceed if proposed legislative reforms are passed.

defection in the game,³⁸⁹ and defections will result in an outcome with fewer overall payoffs for the interests of informality and due process at least in the context of determining the scope of claims.³⁹⁰

Ultimately, the process of determining the scope of claims is optimized for purposes of ensuring an informal and nonadversarial claims system as well as a system that promotes accurate agency decision-making and provides due process protections. One cannot attain higher payoffs in an optimized game with defections or workarounds. The only way to improve a locally optimized system is to start from scratch in order to create a globally optimized system. In order to achieve a global optimum, it will take a complete and radical overhaul of the current system with careful planning and a great amount of investment from all stakeholders.³⁹¹

Conclusion

It is conceded that the specific doctrine governing the determination as to the scope of claims, which is derived from the duty to sympathetically read and develop claims to their optimum, is aptly criticized for contributing to delays in adjudication and the procedural whack-a-mole game of recurrent remands for further development. However, this game-theoretical model shows that the doctrine that has been developed by the Court of Appeals for Veterans Claims and the Federal Circuit is the best developed doctrine given the two competing, but equally pro-claimant, interests of veterans law. Despite the difficult task of acting as rational

³⁸⁹ A defection is a non-cooperative action by a player in a game. *See* Sethi, *supra* note 23, at 541.

³⁹⁰ *See id.*; *cf.* RASMUSEN, *supra* note 10, at 361 (Nash characterized cooperative games as fair and efficient, with neat predictions of the outcomes of utility maximization).

³⁹¹ *See* Allen, *Justice Delayed; Justice Denied*, *supra* note 18, at 19–20. Such an overhaul may also require stakeholders to play the “meta-game” by considering other administrative benefits adjudication systems and choosing the best and most relevant qualities in those systems.

instruments for two competing interests, the members of the judiciary have continued to optimize payoffs for each interest to support the goal of creating a pro-claimant adjudication system.³⁹²

This is not to say that there may be doctrinal confusion and failures to adhere to precedent in other veterans law canons.³⁹³ However, although there may be a small element of human error that may offset the perfect information set, the judicially developed doctrine governing the scope of claims has played out in an axiomatic Nash equilibrium with optimized strategies taken at every turn by the rational instruments of reasonable players. Therefore, the doctrine's outcome will inevitably be locally optimized, and the Veterans Claims Court and Federal Circuit should be commended for playing such a neat, fair, and efficient game.

However, the practical inefficiencies of the veterans claims system simply cannot be ignored. Nor can proposed workaround programs and legislative reforms mitigate the fact that the doctrine governing the determination as to the scope of claims significantly contributes to the hamster wheel. As leading scholars in the field suggest, the system is broken and warrants a complete overhaul. In reinventing the system, due consideration should be given as to whether an objectively reasonable, pro-claimant system can exist with two inherently competing interests of informality and due process. Indeed, given the institution's united mission of creating a pro-claimant adjudication system, leaders in this field should consider whether it is reasonable to

³⁹² See, e.g., *Acciola v. Peake*, 22, Vet. App. 320, 327 (2008) (recognizing “that the difficult task of sympathetically reading CUE motions must apply common sense to balance reasonable assistance to the veterans against undue burdens on the Secretary and the negative consequences of sympathetically raising weak CUE arguments only to deny them”).

³⁹³ See, e.g., *Ridgway, Toward a Less Adversarial Relationship Between Chevron and Gardner*, *supra* note 9, at 391–92 (“Although veterans law has been subject to judicial review for over twenty-five years, the courts still have yet to develop a coherent doctrine regarding when to draw from which box. Each set of tools tends to be phrased as mandatory default rules and overriding principles, rather than general concerns subject to countervailing considerations. Instead of trying to reconcile the coexistence of seemingly contradictory principles about how to resolve ambiguity, the courts persistently avoid the tension between the toolsets by just applying one or the other, without discussing their interaction.”).

create a system of administering veterans benefits that can be modeled as a game with competing players and qualitatively different payoffs which can only achieve Pareto-optimization.