Abraham Lincoln, Contract Disputes,
and Remedying Legal Inefficiencies

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Abstract

The objective of this project is to combine the preceding research in the fields of the Coase theorem, game theory, contract law, and the history of Abraham Lincoln to expose the intentions of his career as an attorney. Through this sample of Lincoln’s contract cases found on the *Second Edition of the Law Practice of Abraham Lincoln* database, it becomes clear that the legal system is associated with high transactions costs. The high cost of taking a case to trial can, and should be, avoided through bargaining and out of court settlements. It is important to use Lincoln as the center of this research because his cases show signs of an economist’s perspective. There are, of course, cases that highlight the economic inefficiency associated with trials, but there are also cases in which Lincoln, as the attorney, employs techniques consistent with cooperative game theory that lower these transaction costs in a way that would follow the Coase theorem. Because Coase’s original theory is representative of a fictional world with no transaction costs, I argue that a normative application of the Coase theorem, through the practice of specific performance as a remedy, can be employed to identify ways the legal system can be changed to reduce transaction costs. Lincoln once wrote in his notes for a lecture, “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser---in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.” This paper will prove Lincoln’s intentions to limit transaction costs by applying contemporary economic theories to this historic account.
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**Introduction**

Watch any courtroom drama, and you will find that legal careers are often depicted as glorified and exaggerated versions of human chess. According to pop culture, to win a case one must employ strategy and deception. While most viewers take in these television shows with a grain of salt, producers are not far off in their interpretations. Life as an attorney is a calculated game where the objective is to minimize loss and maximize monetary gain, and this is not a new phenomenon brought on by popular culture. Before Abraham Lincoln was elected president in 1861, he practiced law for more than 25 years. Lincoln left behind a trail of documents that come together to paint a detailed portrait of his legal career, including the techniques, which were implemented to play the legal game.

Discussed in the succeeding sections is a sample of contract cases that represent the range of different courts, roles, and issues of Lincoln’s legal career prior to the Civil War. With his widely varied career in law, Lincoln was exposed to different techniques for settling disputes. The digitized documents found on [www.lawpracticeofabrahamlincoln.org](http://www.lawpracticeofabrahamlincoln.org), detail Lincoln’s antebellum legal career through scanned copies of primary source documents dating from 1834 to 1861.\(^1\) These documents include fee books, court dockets, sheriff’s notes, writs, complaints, verdicts, and original

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\(^1\) *The Second Edition of the Law Practice of Abraham Lincoln* notes that due to the Chicago Fire of 1871, much of Lincoln’s Illinois federal court records prior to 1855 have been destroyed. This makes generalizations about his pre-1855 federal law practice difficult to conclude.
contracts. Using *The Collected Works of Abraham Lincoln*, these documents can be paired with Lincoln's daily journals and ledgers to reveal that Lincoln used bargaining methods consistent with Ronald Coase's theorem featured in his article, *The Problem of Social Cost*. The Coase theorem states that if transaction costs\(^2\) are low, then it does not matter the initial assignment of property rights to achieve an efficient allocation of resources. This means that if there are few factors that interfere with the ability to bargain, then the parties involved will reach a settlement. By examining a selection of contract cases from the digitized collection, there is evidence that Lincoln was involved in many settlements, a sign that a surplus could be reached by both parties through cooperation.

This paper will be organized in different sections to allow for a clear understanding of the research and analysis. The first section will give a brief description of Abraham Lincoln's path to his legal career, including some background specifically in the area of contract law. The second section is a literature review that will feature research from scholars that will later be incorporated into the analysis portion of this paper. The literature review is further broken down to describe Coase's work and the theorem named for him as well as contract law and game theory. Next, I examine a selection of eighteen of Lincoln's contract cases that he took on as an attorney. The cases in the sample are divided into the categories of: Assumpsits, Debt Recovery and Damages, Railroad Damages, and Lincoln in the Role of Judge. The fourth section introduces a possible remedy for correcting the identified inefficiencies, and the final section concludes the argument.

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\(^2\) Transaction costs are the costs incurred in making an economic exchange. They are divided into the categories of search costs, bargaining costs, and enforcement costs (Cooter and Ulen, 2012, p.88).
Brief Timeline of Lincoln’s Legal Career

According to the second edition of *The Law Practice of Abraham Lincoln*, Lincoln was involved in 2,322 contracts cases throughout his 25-year career as a practicing attorney in Illinois. Lincoln decided to pursue a career as an attorney following his 1834 election to the state legislature. There, he was persuaded by John Todd Stuart to become a member of the bar. Traditionally one would prepare for the bar by clerking in legal offices, but since Lincoln was preoccupied by his position as representative, he would travel 20 miles to Stuart’s office to borrow law books in between legislative sessions. Lincoln was granted a license to practice law in September 1836 and joined Stuart in Springfield, Illinois as a junior partner in 1837 (LPAL).

Stuart and Lincoln ran a general practice, taking on cases from a wide variety of fields. However, the majority of these cases were contract and debt issues. Lincoln worked with his partner until Stuart left for the US Congress. Lincoln ran the practice solo until 1841, when the two formally dissolved the firm. Immediately after, Lincoln became a junior partner for Stephen T. Logan. Lincoln left this partnership to begin his own practice with William H. Herndon in 1844. Lincoln stayed in this partnership until he left to become president in 1861, leaving for short periods of time to pursue his political career as a state legislator (LPAL).

A Note on the Economy of the Time

While considering the future sample of Lincoln’s cases it is important to remember the state of the economy of the time period. During Lincoln’s practice of law, there were two great economic disasters: the Panic of 1837 and the Panic of 1857. The Panic of 1837 occurred when New York banks, which were at the core of the young and fragile American
economy came under strain. Peter Rousseau writes in his article, “Jacksonian Monetary Policy, Specie Flows, and the Panic of 1837” (2002) that, “the specie reserves of these banks came under increasing strain as they reacted to legislation designed to achieve ‘political’ distribution of the surplus balances among the states ad an executive order allegedly aimed at ending speculation in the public lands” (Rousseau, 2002, p. 486). The Panic of 1837 is described as the most severe financial panic in the history of the US economy, leading to stock market price plummets in banking, railroad, and industrial securities (Rousseau, 2002, p.457).

The Panic of 1857 was similar to the panic twenty years earlier in that it also involved the suspension of specie payment. According to James L. Huston in his article, “Western Grains and the Panic of 1857” (1983), there are two reason for the suspension of specie payments. These are the transition to paper money and the low tariff policy of the federal government (Huston, 1983, p.14). The panic was intensified when business started to fail, especially in the railroad industry (Huston, 1983, p. 15). The Panic of 1857 is said to have added tension between the North and South, because the South's agricultural industry did not suffer near as much as the North’s (Huston, 1983, p.16). The tension created by the panic led to a loss of confidence in the economy, and affected the way Americans spent money. These panics likely affected the types of cases that Lincoln chose to take on, as well as the economic stability of his clients.

Lincoln’s Contract Background

Lincoln’s legal career included work in county, state and federal courts—including appellate and Supreme Courts, as well as appearances with justices of the peace cases and out of court settlements. He also spent time in the spring riding the Eighth Judicial Circuit,
which included arduous travel across fifteen Illinois counties. (LPAL) Lincoln served in many different legal capacities including: defense attorney, prosecuting attorney, witness, judge, and reporter. The types of cases he took on also have breadth. Because Lincoln practiced during a time of financial strain, a majority of his cases featured debt and contract related issues. In these cases, Lincoln represented both debtors and creditors. The courts of the day tended to operate in a creditor-right’s society, where the creditor was almost always favored (LPAL). Therefore, Lincoln had a losing record when defending debtors and a winning record when defending creditors. Other contractual disputes he dealt with included railroads, patents, property rights, and wills.

**Literature Review**

The literature reviewed in the following paragraphs relates to the Coase theorem, contract law, and game theory. Together, the Coase Theorem, contract law, and game theory will serve as a theoretical framework within which the selection of Lincoln’s sample contract cases can be examined for evidence of cooperative solutions. A discussion of Ronald Coase and his famous paper, “The Problem of Social Cost” is followed by an examination of the way bargaining games can be used to analyze contract law.

**Ronald Coase and “The Problem of Social Cost”**

Coase’s paper, “The Problem of Social Cost” was published in *The Journal of Law and Economics* in October of 1960. According to Steven Medema’s book, *Ronald H. Coase*, Coase was awarded the Nobel Memorial Prize in Economic Sciences in 1991 after dedicating nearly five decades to the field (Medema, 1994, p.ix). Born in England, Coase received his Bachelor of Commerce degree from the London School of Economics (LSE) in 1932, where he was mentored by Professor Arnold Plant (Medema, 1994, p.4). There, Plant encouraged
Coase to study industrial organization and applied economics (Medema, 1994, p.4). Coase had one year remaining at the LSE, and decided to study industrial law with the intention of becoming a lawyer (Medema, 1994, p.3). However, upon Plant’s recommendation, Coase received a scholarship to study organizational and industrial structures in the United States, a move that pushed him away from a legal career (Medema, 1994, p.3). Upon graduation, Coase taught economics at the University of Liverpool, London School of Economics, University of Buffalo, University of Virginia, and, most notably, the University of Chicago (Medema, 1994, p.6). As a professor, Coase contributed scholarly articles to journals that emphasized the study of real markets and Plant’s beliefs over the highly theoretical economic ideas that were popular of the time. Coase’s best known articles include: “The Nature of the Firm” (1937), “The Marginal Cost Controversy” (1946), “The Federal Communication Commission (1959), and “The Problem of Social Cost” (1960).

“The Problem of Social Cost” is perhaps the most famous because it is from this article that the Coase theorem emerges. Interestingly, the Coase theorem is not stated explicitly in this paper, and it is only one among the many ideas presented. The purpose of “The Problem of Social Cost” is to examine the problem of externalities, specifically the difference between marginal private and marginal social costs and/or products (Coase, 1960, p.1). Coase motivates the paper by critiquing the Pigovian tradition (named after the brilliant Cambridge economist, Cecil Pigou, who first identified pollution as a negative externality and public goods as embodying positive externalities) that suggests the problems with externalities should be corrected through government intervention via taxes, subsidies, and/or regulation (Medema, 1994, p.68). Coase argues that the traditional approach to dealing with externalities is misguided, and that economists should be more
concerned with the question of which externalities should be permitted (Coase, 1960, p.2). This question begs for identification of original rights assignment and the interest of protection from harm, so Coase uses the classic rancher-farmer property dispute to illustrate an apparent paradox (Coase, 1960, p.2-8). The Coase theorem states that the original assignment of property rights is irrelevant to achieving economic efficiency as long as there are zero transaction costs and low wealth effects. In the dispute between the rancher and the farmer where roaming cattle damage crops on the farmer's field, Coase suggests that even though the orthodox Pigovian solution would be for the rancher to fence in her own cattle, the fence that might be built around the farmer's field could be cheaper. Therefore, both parties could benefit, from a settlement in which the rancher pays the farmer to fence his field plus a portion of the surplus generated from choosing a cheaper solution to the dispute. Hence, both parties enjoy a portion of surplus generated by bargaining to solve the dispute.

Coase, channeling the attitudes of his mentor Plant, then looks to apply this approach to several historical British cases. For example *Bryant v. Lefever* (1878), details a situation where two neighbors in an adjoining houses engage in a nuisance over a malfunctioning chimney. Lefever tore down the side of his house and rebuilt it much higher than Bryant’s house. In the process, Lefever stored timber on the roof, which caused Bryant’s chimney to smoke inside the house whenever he lit a fire (Coase, 1960, p.11). Coase suggests that this nuisance is the fault of both parties, and therefore, both parties should act to remedy the situation (Coase, 1960, p. 13). When both parties are at fault and the cause of harm cannot be clearly defined, the effects are referred to as reciprocal in nature (Medema, 1994, p.81). This is different than the Pigovian approach (and the
approach of the judge in this case), which might attribute the responsibility to remedy to Lefever, because he was the source of the nuisance. The court found in favor of Bryant and assessed 40 pounds in damages as the wall interfered with Lefever’s livelihood, but was later reversed on appeal.

Through this practical application of his theorem, Coase comes to the conclusion that a world without transaction costs is unrealistic (Coase, 1960, p.15). In these instances, he suggests that parties should act to avoid the most harm and maximize the value of output thereby maximizing social welfare (Coase, 1960, p.15). Coase, then, alters his theorem: “Once the cost of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about” (Coase, 1960, ps.15-16). Now, the initial assignment of property rights matters. In some cases, government intervention may be required, but may prove to be expensive (Coase, 1960, ps.17-18). The law should seek to find the most economically efficient solution, which would require deciding cases as if there were no transaction costs. The idea that the courts should structure rights to minimize transaction costs is sometimes referred to as the normative Coase theorem (Medema, 1994, p.78). Government intervention in reducing transaction costs might come in the form of taxes, subsidies, regulations, or liability assignments (Medema, 1994, p.82).

Within the Coase theorem there are two assumptions that are made. The first is that in the absence of transaction costs, there will be some kind of efficient allocation of resources, despite the legal rule. This is often referred to as the efficiency claim (Medema, 1994, p.84). The second (and more controversial) assumption is the invariance claim
(Medema, 1994, p.87). The invariance claim states that the allocation of resources will not only be efficient, but it will also not matter the legal assignment of rights (Medema, 1994, p.87). These two assumptions have sparked criticism of the Coase theorem. Donald H. Regan writes about the implications of the efficiency and invariance claims in his essay, “The Problem of Social Cost Revisited” (1972).

To be clear, Regan does not dismiss the Coase theorem in its entirety. Regan does, however, argue that the Coase theorem is a theory for games, and not an accurate claim about a traditional market or competitive equilibrium (Regan, 1972, p.428). Regan’s distinction is useful, because it can be argued that the litigation that Lincoln practiced does satisfy conditions necessary for a perfectly competitive market structure, and is more consistent with a game structure in which bargaining over price is encouraged and not set by the market. Lincoln is not operating in the market structure, but he is bargaining with another person. A two-person negotiation like the ones Lincoln participated in are consistent with the game theory. Regan points out that there are other economic scholars who have disregarded the Coase theorem’s efficiency claim as tautological, like Calabresi, but he does not agree with his opinion either (Regan, 1972, p.429). Calabresi argues that the Coase theorem is a tautology because in cases where there are rational actors and no transaction costs, the economic environment will of course be Pareto efficient (Regan, 1972, ps.428-9). Regan argues that this is not necessarily true in a variable sum game, because while the players are both seeking the cooperative surplus, they are also seeking to gain as large a portion of the cooperative surplus as possible (Regan, 1972, p.429). This will lead to players threatening noncooperation and the possibility of the game being carried out in a “sub optimal Pareto sense” (Regan, 1972, p.429).
In regard to both the efficiency and the invariance claims, Regan suggests that in a perfectly competitive market there is no way to isolate assumptions about individual behavior and technology from the efficiency of the equilibrium, which leads to a priori arguments. This argument is a priori because it comes to conclusions about individual behavior without basing the assumptions on a model of how they behave (Regan, 1972, p.431). If the a priori argument is accepted for the invariance claim, “part of the theorem becomes undecidable, since the allocation of resources resulting from any given legal situation is incompletely specified (Regan, 1972, p.431). Regan suggests considering the Coase theorem’s invariance claim in a bargaining setting. Regan states that in any plausible bargaining situation, the outcome will be somewhat dependent on the strength of each party’s wealth effect (Regan, 1972, p.432). Since legal rules are an important determinant of bargaining position, they will undoubtedly be a factor in the bargaining outcome (Regan, 1972, p.432). Regan suggests that even in the bargaining setting, the invariance claim of the Coase theorem is false (Regan, 1972, p.432). This will prove valuable when assessing the bargaining positions of Lincoln and his legal opponents.

**Contract Law and Game Theory**

In Robert Cooter and Thomas Ulen’s text, *Law & Economics*, they explain that the “bargain theory of contracts” was designed in the late nineteenth century to answer two fundamental questions: (1) what promises should be enforceable at law, and (2) what should be the remedy for breach of enforceable promises? (Cooter and Ulen, 2012, ps.277-280). The answer to the first question is called the “bargaining principle” (Cooter and Ulen, 2012, p.277). The bargaining principle states that, “a promise is legally enforceable if it is given as part of a bargain; otherwise, a promise is unenforceable” (Cooter and Ulen, 2012,
This means that a promise is legally enforceable, if there was negotiation over price and if consideration was exchanged between the parties. Cooter and Ulen also implement one of the fundamental concerns of economics, fairness, when explaining contract law. In order for a bargain to be fair, the consideration given must be of equal value (Cooter and Ulen, 2012, p.279). However, a court should enforce any consideration-backed promise regardless of fairness (Cooter and Ulen, 2012, p.279). Determining which of Lincoln’s contract cases are enforceable and fair will speak to the economic efficiency of his legal techniques.

The answer to the second question, what should be the remedy, is the “benefit of the bargain” to the promise, which simply means that the expectation of the contract be fulfilled through awarding damages. With these questions answered, Cooter and Ulen determine that economic efficiency occurs when both parties of the bargain want enforceability (Cooter and Ulen, 2012, p.284). Contracts, therefore, turn games with non-cooperative solutions into games with cooperative solutions (Cooter and Ulen, 2012, p.285). This means that contract law allows for efficiency in bargaining that did not previously exist. Consequently, Cooter and Ulen point out that there are times when the promisor incentive has an incentive to breach a contract (Cooter and Ulen, 2012, p.289). The promisor is the person that makes the promise and the promisee is the person to which the promise is made. The promisor might face an incentive to breach the contract if the expectation damages will be lower than the costs of performing the contract.

Cooter and Ulen then discuss the relationship between the Coase theorem and contract bargaining. They state contract bargaining follows the Coase theorem when transaction costs are zero, because it is then that legal entitlements will allocate efficiently
These perfect contracts are hard to come by, and most contracts are “real”. Real contracts have gaps that need to be filled by courts and mandatory rules in which the law regulates the contract (Cooter and Ulen, 2012, p.292-4). With real contracts, the law can reduce the costs of negotiation by issuing efficient default and mandatory terms (Cooter and Ulen, 2012, p.305). Cooter and Ulen point out that state law is expensive and will prove ineffective for economic purposes (Cooter and Ulen, 2012, p.305). Cooperation, especially within long-run relationships, will have a better chance at an efficient outcome. Cooter and Ulen also introduce the idea of threat values to help determine the efficient solution. Threat values are the payoff to each party in a non-cooperative solution (Cooter and Ulen, 2010, p.79). The cooperative solution is a possible outcome of bargaining theory in which an agreement is reached and an exchange is made. A cooperative surplus is the difference in value between cooperation and non-cooperation (Cooter and Ulen, 2012, p.75). This introduction to the economics of contract law provides a comprehensive look at the intersection of the two studies, and will be applicable to Lincoln’s legal career.

Following the same path as Cooter and Ulen, Enrico Guzzini and Antonio Palestrini analyze the Coase theorem and contract bargaining in their article, “Coase Theorem and Exchangeable Rights in Non-Cooperative Games” (2009). Guzzini and Palestrini choose to focus on the non-cooperative setting. The purpose of their article is to determine the difference between temporary binding contracts and permanent binding contracts in respect to the final attribution of individual rights. Like Cooter and Ulen, Guzzini and Palestrini mandate that for efficiency to be reached, parties must have a binding contract. They begin their analysis by emphasizing the importance of individual rights within the
Coase theorem. This article uses the game form representation of individual rights, which means “rights attribute to the individual the entitlement of choosing within a set of permissible strategies” (Guzzini and Palestrini, 2009, p.3). Once the rights are established, individuals exercise them through non-cooperative games. The individuals become part of the social state and have influence over the final outcome (Guzzini and Palestrini, 2009, p.3). Guzzini and Palestrini operate the subsequent games using an initial assignment of rights or liability rules. For example, in one strategy a polluter has the right pollute, but in another strategy the polluter no longer has that right. Another distinction these authors clarify is that the rights assigned are alienable, meaning they can be exchanged with one another (Guzzini and Palestrini, 2009, p.3). With the rights established, the authors go on to define the economic environment of non-cooperative games.

Dependent on which right rules, each player has a series of strategies and corresponding payoffs. When there is a switch in the rights regime (i.e. polluters that once had the right to pollute no longer do), then there is evidence of bargaining. This economic environment also has six assumptions: (1) agents can switch to the other right, (2) no transaction costs, (3) no side payments, (4) when there are no binding contracts, each player acts rationally by choosing the dominant strategy, (5) the game has indefinite rounds, and (6) temporary binding contracts obliges agents only a single move and can be specified more than one time (Guzzini and Palestrini, 2009, ps.4-5). Using these factors to define the environment, the authors determine if the Coase theorem holds in the presence of a binding contract.

Guzzini and Palestrini conclude that in the presence of temporary binding contracts (with a minimum of two players), “it is possible to have an endless bargain of individual
rights” (Guzzini and Palestrini, 2009, p.11). This is because it is possible to find a utility function in every game where the Nash equilibrium is also Pareto dominated by the result of the other game (Guzzini and Palestrini, 2009, p.11). Additionally, the authors conclude that in order for endless bargaining to occur, each player must receive a spillover (or externality) in each game. If a binding contract (permanent or temporary) is present, the Coase theorem will hold. When the third assumption regarding the economic environment is removed—that is to say, side payments are allowed—individuals are not able to achieve efficiency, and therefore, the Coase theorem does not hold. This is because players can use transfers to manipulate the other player, which leads to the inefficient use of resources.

Guzzini and Palestrini’s application of the Coase theorem, game theory, and contract law is rare. There is little research on this topic, and the authors make note of this in their article. Because of the limited availability of scholarly research on this topic, this article will be useful in analyzing Lincoln’s contract disputes that did not end in settlement. I turn now to an analysis of Lincoln’s cases for evidence of bargaining toward a cooperative surplus.

**A Sample of Lincoln’s Contract Cases**

The objective of this project is to combine the preceding research related to the Coase theorem, game theory, contract law, and Abraham Lincoln’s law career to identify evidence of cooperative bargaining. The following sections will represent a sample of

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eighteen cases from the primary source database titled, *The Law Practice of Abraham Lincoln*. The cases are all instances of contract disputes and are organized by the following categories: Assumpsits, Debt Recovery and Damages, Railroad Cases, and Lincoln in the Role of Judge. As previously noted, the Coase theorem in its most basic form is tautological. Clearly, in any society where there are zero transaction costs, bargaining will allow for an efficient allocation of resources, regardless of the initial assignment of property rights. Through this sample of Lincoln’s contract cases, it becomes clear that the legal system he worked in had high transactions costs. The high cost of taking a case to trial can, and should be, avoided through bargaining and out of court settlements whenever possible. It is important to use Lincoln as the center of this research because his cases show signs of an economist’s perspective. There are, of course, cases in this sample that highlight the economic inefficiency associated with trials, but there are also cases in which Lincoln, as the attorney, employs techniques consistent with cooperative game theory that lower these transaction costs in a way that would make Coase proud. Because Coase’s original theory is representative of a fictional world with no transaction costs, I argue that a normative application of the Coase theorem, as explained by Cooter and Ulen, be employed to explain why the government should act to change the legal system to one that minimizes transaction costs, in order to divert court-related expenditures to more economically efficient purposes.

**Assumpsits**

This first set of sample cases are actions that Abraham Lincoln was very familiar with, the assumpsit, or an action used in many different situations to remedy the breach of a simple contract that was not under seal (LPAL, 2009). The action of the assumpsit was
used to collect promissory notes, damages from a breach in a marriage contract, damages caused by fraud or misrepresentation, damages for a failure to deliver goods, and in many other contract situations. The most frequently used common law action was the assumpsit (LPAL, 2009). Assumpsits are different from debt collection based on the nature of the award possible. If a plaintiff wanted the amount of damages to be left up to the opinion of a jury, he or she would sue in an action of assumpsit (LPAL, 2009). In the instances of promissory notes, the plaintiff could sue in an action of assumpsit to recover the amount of the debt and damages (including, interest and any additional damages deemed necessary). The following cases are classified as an action of assumpsit, regardless of their success in obtaining the action.

The first case considered here, *Alexander v. Brown*, was filed with the Sangamon County Circuit Court in March of 1847. In this case the plaintiff, Robert Alexander, sued J. Vincent Brown in an action of assumpsit. The details of why Alexander is seeking damages from Brown are not clarified more than a simple breach of contract. However, it can be ruled out that Alexander was seeking to recover a debt or promissory note, because the record shows that Alexander was only seeking damages, and not restitution. Brown being asked to respond to Alexander’s claim, sought out the legal counsel of Lincoln and Herndon for representation. Since this was an action of assumpsit, there was no amount certain in damages being sought by Alexander, and it was instead up to the jury to determine the proper remedy. In this instance, bargaining is not an option. For some undisclosed reason, damages could not be settled between the parties through bargaining. If they had been able to settle through bargaining, the transaction costs would have been low, implicitly. According to Coase bargaining would have led to an efficient allocation of resources, no
matter the original allocation of the rights in the dispute. In this instance, however, a court and jury are required to settle the case on behalf of the parties.

Not being able to settle the dispute among themselves means that both parties will encounter court costs. These court costs can be identified as transaction costs. Transaction costs come in three different forms: search costs, bargaining costs, and enforcement costs. The transaction costs associated with Alexander bringing this to suit are enforcement costs.

For some reason, Alexander feels that the deal between him and Brown is causing him harm. The original agreement between the two parties is not being upheld, and a court is required to enforce it. The transaction costs associated with Alexander v. Brown are quite substantial. The below images, Figure 1 and Figure 2, represent the fee bill of both Alexander and Brown.

Figure 1. Alexander’s Fee Bill

Figure 2. Brown’s Fee Bill
Alexander’s total costs of taking this dispute to court are $52.875. This total arises from filing fees, sheriff fees, jury fees, 12 witness fees, and the judge’s travel fees. Brown’s transaction costs total $6.3125. This total is calculated from filing fees, sheriff fees, and one witness fee. The total cost of both parties equals $59.1875. This total has a purchasing power of $1,760.00 2014 US dollars (MeasuringWorth, 2015). On top of the court costs, it is recorded in Lincoln and Herndon’s office fee book that Brown had to pay an additional $10 in legal fees.

When the case went to trial, the jury decided for the plaintiff and awarded damages of $100.00 dollars. The official writ of fieri facias, a document giving the sheriff the permission to collect debts or damages, states that Brown must pay the $100 in damages and Alexander’s $52.875 in court costs. In addition, Brown has to pay $10 in legal fees and $6.3125 in court costs. The total amount Brown owes is $169.175. Had the two parties cooperated like the Coase theorem suggests, each party could have enjoyed a surplus. Alexander walks away from this court case with no responsibility to pay court costs (he may have to pay legal fees, but those are not recorded) and $100. Instead of going to court, Brown and Alexander could have agreed on the same $100 in damages. Through cooperation Brown would have saved $69.1875. In a world of perfect cooperation this sum would be split in half and given to each party. Brown would then be responsible for $134.59375. By bargaining, both parties enjoy a surplus of $34.59375.

In another case, Paddock v. Snyder (1851), the plaintiff, Samuel Paddock, is suing the defendant, Nathan M. Snyder, in an action of assumpsit. Paddock claims that Snyder failed to pay him for $1,200 worth of goods and merchandise. This is an interesting case to consider because it is both an example of a settlement between the two parties and having
to take the dispute to court. The case was filed in May of 1851. Lincoln was the attorney for Snyder. The case was ultimately dismissed in October of 1853, after the parties reached a settlement out of court. For two years, Lincoln filed affidavits and continuances at the cost of the defendant that resulted in a delayed judgment. This case, like *Alexander v. Brown*, is an example of the failure of the legal system, and Lincoln to capture a cooperative surplus as suggested by the Coase theorem. In the official order, the judge writes, “this day came the parties by their attorney and this case is dismissed at the defendants cost, as per agreement herein filed.” Lincoln, the defendant’s attorney, allowed court costs to add up over the two years (maybe to force the plaintiff’s costs to also go up), and then realizing the benefit of bargaining toward settlement, was able to reach an agreement with the other party. However, the court costs fall to the defendant within this settlement. While the specific court costs are not detailed in the court records like they were in the previous case, it is fair to assume that after two years these will be representative of high transaction costs.

The first two cases in this sample are examples of how Lincoln succumbed to the inefficiency of the court when settling disputes. In the next case, Lincoln used the court’s inefficiency to his and his client’s advantage. Lincoln and his senior partner, Stuart, represented the plaintiff, Poor, in the case of *Poor v. Stafford* (1838). Poor and Stafford agreed on a contract in which Stafford exchanged horses with Poor whereby Poor paid $4 to Stafford with the contingency that the horse Poor was receiving was healthy and free from a disease called glanders. Shortly after purchasing the horse from Stafford, Poor claims that horse “was badly affected.” Poor sued Stafford because of this breach in contract under the action of assumpsit, with a request of $150 in damages (although this
value is uncertain in the action of assumpsit and would ultimately be determined by the court). While the original contract between the two parties is not on record, the stipulation over which the parties are disputing was clearly a contingency in the original agreement. Poor agreed to pay Stafford $4 dollars for the healthy horse. The fact that the horse fell ill recently after the exchange leaves a small gap in the contract. The small gap left open is the timing component. Stafford did not specify how long how the health of the horse would last, only that the horse was free of glanders at the time of the exchange.

According to Cooter and Ulen, if this gap was closed in the initial contract, then there would be no associated transaction costs and the legal entitlements would allocate efficiently. The intentions of Stafford are unknown. Did he know that his horse possibly had glanders, and sold it to cut the loss? This is uncertain. However, it can be determined that Stafford valued the horse at the time of the sale at less than or equal to $4 plus the value of his previous horse, otherwise he would not have sold it. Poor valued the horse at the time of the sale at greater to or equal to $4 plus the value of his original horse, or he would not have bought it. Stafford could have agreed to the contract with the intention of breaching it, if the costs of expectation damages were less to him then the costs of keeping the afflicted horse. Nonetheless, Poor sought remedy from the court, not through expectation damages (which would equate to $4 plus the value of a healthy horse), but through $150 in damages, the breakdown of which is recorded in Lincoln and Stuart’s declaration as the total expense of, “feeding, keeping, and taking care of the said horse”. Stafford would have been much better off giving Poor his money back and re-exchanging the horses.

In Lincoln’s declaration to bring this file to suit, he claims that Stafford, “fraudulently intend[ed] to injure the said plaintiff and not inform or regard his said promise and
undertaking; but thereby craftily and subtly deceived the said plaintiff.” Stafford has little defense in this case. Consideration was given at the time of the agreement, and therefore, the role of the court is to fill the gap as if it were going to be a part of the original agreement. Lincoln likely took this case, realizing that the court would side with the plaintiff based on the parameters of the initial contract. Ultimately, this case was never heard by a judge or jury. Lincoln bargained with Stafford, and on March 9th of 1839, the case was dismissed upon mutual agreement and consent of both parties. There are no recorded court costs or legal fees in the document database that are associated with this case. While it is likely that there were transaction costs associated with this case (especially since the case was open for six months), Lincoln attempted to limit them by settling out of court. This contract was not “perfect,” but it did have a specific stipulation that was hard for the defendant to argue against. Lincoln used the potential of high transaction costs associated with settling the issue in court to push the defendant toward cooperation.

Settling a case out of court can sometimes be done through arbitration. In today’s society, arbitration does not always mean reduced transaction costs. Paying a panel of highly qualified decision makers can be more expensive than taking a case to court, and is therefore not advisable in disputes over small amounts. However, arbitration works better in cases that are time sensitive and require confidentiality. Arbitration is sometimes listed in contracts as the preferred method of settlement. Decisions made in arbitration are recognized as legally binding by court systems. Arbitration was the method of bargaining used in the case Brown v. Council (1858). Lincoln acted as the defender on behalf of Harvey Council. The dispute between Brown and Council is not detailed in the record. The case was removed from the docket and referred to arbitration on November 10th, 1858. The panel of
three arbitrators decided against Council, and awarded Brown $40 in damages. According to the judge’s docket, Council must pay the $40 plus $104.45, which is not defined, but is possibly the fee that goes to the arbitrators. On top of the court costs, Council is also responsible for paying Lincoln’s legal fees of $95.70. This example suggests that the transaction costs outweighed the possible benefit from legal intervention. Council loses a total of $240.15 when, as the defendant, the best-case scenario would pay off $0. Had Council offered $40 to Brown from the beginning, he and Brown would have been much better off. A cooperative surplus could have been enjoyed at a higher agreed value, say $100. Here non-cooperation increases Council’s losses and exposes the high transaction costs sometimes associated with arbitration.

Action of assumpsit to recover a promissory Note. If one was attempting to recover the debt of a promissory note through the action of assumpsit, to collect damages for the failure to pay the debt including the original debt, interest, and additional damages (LPAL, 2009). This is different from recovering a promissory note from an action of Debt that did not include additional damages. Recovering debts was an action that Abraham Lincoln did repetitively. Because of the state of the economy between the Panics of 1837 and 1857, it was common for debtors to default on their promissory notes from creditors. Creditors were not immune to the financial stress of the time and often sought legal action in order to recover their money. The following two cases illustrate Lincoln’s role in recovering promissory notes under an action of assumpsit.

The first case is Millikin & Martin v. Dean & Dalby (1858). In this case, Dean and Dalby gave Millikin and Martin two promissory notes that equaled $3,500. Millikin took the notes to Springfield Marine Bank in order to cash them, but the bank refused to do so.
Millikin and Martin, therefore, sued Dean and Dalby with a request from $5,000 in damages. Lincoln represented Dean and Dalby. Lincoln apparently negotiated with Millikin and Martin out of court, because court records reflect that the next time Lincoln appeared in court on this matter, he confessed judgment for $3,842.71. This was a substantial amount of money for the time, so had Lincoln not been pleased with the fairness of the negotiation, he would have proceeded by allowing a trial by jury. This case shows bargaining techniques on Lincoln's behalf that minimize the total costs that his clients could have incurred. For example, Lincoln’s clients must return the original sum of the promissory note, $3,500, and additional $342.71 in damages. Notice the difference between this savings and the amount actually paid. The non-cooperative solution would have costs Lincoln’s clients $5,000. The cooperative solution in this case costs Lincoln’s clients $3,842.71. Therefore, the cooperative surplus for Lincoln’s clients equals $1,527.29/

The second case is *Zug, Lindsay & Co. v. Piper & Shoup* (1858). In this case, Piper and Shoup bought $1,000 in goods from Zug, Lindsay & Co. and did not pay. The plaintiffs sued Piper and Shoup in an action of assumpsit to recover the debt. Lincoln represented Piper and Shoup. Lincoln, channeling his inner economist, suggested that if Zug stated that he would insure the goods and didn’t, and the goods arrived damaged, then Piper and Shoup could cut their losses through a set-off. According the glossary of *The Law Practice of Abraham Lincoln* (2008), a set-off is, “the defendant’s counter-claim against a plaintiff who had sued the defendant for the payment of money but who also owed the defendant money; if successful, the set off reduced the appropriate amounts to the parties” (LPAL, 2008). Even though this is the plaintiff’s complaint, if the defendant simultaneously experienced a breach of contract, their complaint can affect the outcome of the court.
Lincoln suggested this technique to his client, because there was no refuting that they did not pay. However, if they did not pay because the parameters of the contract were not fulfilled (i.e. non-damaged goods were delivered), then there is room for argument. In the end, the plaintiffs did not appear on the scheduled court date, and the jury awarded $871.99 in damages to the plaintiff, saving the plaintiffs a total of $128.01. This case is an example of how Lincoln tried to use an economist’s perspective to limit the court costs, even though the legal application of the contract and the facts of the case prove his clients liable.

**Debt Recovery and Damages**

To sue in an action of debt was different than to sue in an action of assumpsit. To sue in an action of debt meant that the plaintiff was suing with a certain amount of money and damages already calculated. If the case was heard by a jury, the jury would settle the dispute by siding with one party or the other already knowing how much in damages was being sought to recover. This amount is referred to as “sum certain.” The jury does not assign the monetary value of damages in an action of debt. In the instance of recovering a promissory note through the action of debt, the plaintiff can only sue for the original amount of the note plus interest (LPAL, 2009). Any other additional damages are not included. The following cases are examples of actions of debt that Lincoln worked on during his career.

The first case is *Allsup v. Argo* (1850). Allsup was a mechanic who completed work on Allsup’s house. Allsup hired Lincoln and filed a complaint stating that the work on the house was not paid for according to their contract. Cooter and Ulen note in their chapter on contract law and economics that instead of offering damages as a remedy, the court can
also order that the breaching party perform the specific act (Cooter and Ulen, 2012, p. 320). This is called specific performance (Cooter and Ulen, 2012, p. 320). In this case, the court could have ordered Argo to go back and compensate Allsup to meet the obligations of the contract, but they did not. To do so would mean that court recognizes the promise of the contract as the outcome of a good, and not the value of a good. Cooter and Ulen also state that in instances where there are no close substitutes to the contracted good, that specific performance will not be the remedy, and it will instead be damages (2012, p. 321). In this case, Lincoln suggested that the remedy for the breach to be a transfer of forty acres of Argo’s land to Allsup. This move pushed Argo and his attorney into negotiation with Lincoln for a lesser remedy. Both parties agreed not to convey Argo’s land, and Argo had to pay all the courts costs plus $206.70 for Allsup’s unpaid labor because there are transactions costs expended within the court system that were not necessary to spend in order to remedy the situation. This was a success for Lincoln’s client because he walked away with more than the value of the specific performance, but not a success in terms of economic efficiency. The next case will explain why the remedy of specific performance is usually more economically efficient than damages.

While specific performance could have been and was not implanted in the previous case, it was used in the case of *Calhoun v. Smith & Smith* (1858). In this case, Calhoun gave Edward and Harriet Smith four promissory notes totaling $2,838, which Calhoun secured a mortgage on 50 acres of land. Calhoun retained Lincoln and Herndon to sue the Smiths on specific performance. Lincoln dismissed the case on behalf of the plaintiff, as the parties apparently came to some sort of settlement. In the writ of fieri facias, Calhoun is ordered to pay the court costs already assumed, which totaled $6.85. Thomas Ulen wrote an article in
1984 titled “The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies”. In his article, Ulen paper contends that the remedy for breach of contract is not fully consistent with the achievement of economic efficiency, especially awarding damages (the routine remedy) (1984, p. 401). Ulen makes a distinction between the role of transaction costs in determining the proper remedy when he states,

> If transaction costs are low between the defaulter and the innocent party, then an award of specific performance will encourage the parties to exchange the right to performance voluntarily and efficiently; if, however, those costs are so high that no voluntary exchange can take place, then the court should intervene and compel an exchange at a collectively determined price, that is, the court should award money damages. (Ulen, 1984, p.401)

In the case of *Calhoun v. Smith & Smith* the transaction costs are only $6.85, a relatively low figure for the time. According to Ulen, this would suggest that the court award the specific performance in order to for the parties to both achieve efficiency. Ulen also points out that contract law is different than tort or criminal law, because there is already an established relationship between the two parties (Ulen, 1984, p.401). This is also something that lowers transaction costs. Ulen argues that in contract cases, specific performance will likely be the most efficient remedy to breaches, and awarding damages is not. This argument will return in remedies section of this paper.

**Railroad Cases**

Abraham Lincoln had an interesting history with the railroad companies. According to James W. Ely Jr. of Vanderbilt University, Lincoln viewed railroads as the backbone to economic revitalization after the Panic of 1857. As a politician, Lincoln voted in favor
subsidized improvement and various charters (Ely, 2005, p.1). His presidential campaign relied heavily on constructing additional lines that would eventually connect across the country to the Pacific Ocean (Ely, 2005, ps.1-2). While his political stance on railroads was apparent, his legal relationship with railroad companies was turbulent. As already stated, Lincoln practiced many different types of law. Ely in his article, “Abraham Lincoln as a Railroad Attorney,” writes that the reason for this diversity was out of necessity (Ely, 2005, p.2). Due to the blighted economy, Lincoln scrambled for business in any form he could find it. It is important to note that Lincoln never used his position as an attorney to make political statements (Ely, 2005, p.2). He was more concerned with taking on cases that he knew he could win.

Lincoln was first placed on the Illinois Central Railroad Company’s retainer in May of 1853, and by the late 1850s had received more in fees from the company than any other single client (Ely, 2005, p.6). Lincoln once served as the company’s counsel in a case against McLean County over a dispute on property tax. After winning, Lincoln requested $5,000 in legal fees while his average fees only ranged anywhere from $10 to $100 (LPAL, 2009). When the railroad company did not pay, Lincoln filed suit. At about the same time, *Morrison and Crabtree v. Illinois Central Railroad Company* (1857) came across Lincoln’s desk. Morrison was seeking Lincoln’s representation for his suit against the company over the right of the railroad to restrict liability through contract after the failed transportation of some of Morrison’s livestock on the train. On February 12th, 1857 Lincoln wrote a letter in response to Steele & Summers, law partners from Paris, Illinois, about the matter of *Morrison* (*TCWAL* Vol. II, 2008). Lincoln writes, “I have been in regular retainer of the Co. for two or three years; but I expect they do not wish to retain me any longer... & if they do,
as I expect, I will attend to your business & write you” (TCWAL Vol. II, 2008). Lincoln anticipated that the impending litigation involving himself and the railroad company would dissolve the retainer contract between the two.

While the case between Lincoln and the Illinois Central Railroad Company can only be examined through *The Collected Works of Abraham Lincoln Volume II* (and not in the primary source database of *The Law Practice of Abraham Lincoln*), it is worth considering the dispute as one of the ways that Lincoln used cooperative game theory to minimize the transaction costs of court and maximize his utility. Returning to Cooter and Ulen’s economic approach to contract law will aid in illustrating Lincoln’s cooperative strategy. Cooter and Ulen identify one of the multiple purposes of contract law as its importance in building relations (2010, p.241). They explain that securing cooperation is dependent on the length of the relationship. For example, in one-time transactions, securing cooperation usually demands enforceable promises (Cooter and Ulen, 2010, p.241). In tentative relationships, fortifying cooperation relies on the ability to exit the relationship (Cooter and Ulen, 2010, p.241). In enduring relationships, safeguarding cooperation relies on the game theory notion of tit-for-tat (Cooter and Ulen, 2010, p.241). The notion of tit-for-tat comes from a repeated game sequence, and describes the strategy in which Player 2 will employ the same strategy that Player 1 did in the previous round. Cooter and Ulen suggest that tit-for-tat changes the concern of contracts from enforcing promises to facilitate relationships (Cooter and Ulen, 2010, p.241). For that reason they define one purpose of contract law as a way to, “foster relationship, which solve the problem of cooperation with less reliance on the courts to enforce contracts” (Cooter and Ulen, 2010, p.241).
The repeated game sequence is the same set up in the research of Guzzini and Palestrini. Remember they concluded that in the presence of a temporary binding contract, there is the possibility of endless bargaining; and in the instance of a permanent binding contract, the players must receive a spill over as an incentive in order for the Coase theorem to hold. Also recall that in the final variation of the game, Guzzini and Palestrini removed the stipulation that prohibited side payments, and found that the players will sometimes seek a value higher than their opponent, which leads to inefficiency and a violation of the Coase theorem.

What does this research reveal about Lincoln and the railroads dispute? Lincoln writes in the preceding letter that he had been on the railroad company’s retainer for two or three years. The relationship between the two parties classifies as an enduring relationship under a permanent binding contract. According to Cooter and Ulen, the tit-for-tat strategy is the glue of the contract agreement. To think of Lincoln and the railroad’s agreement in terms of game theory, the first “game” played in this sequence was Lincoln’s representation of the railroad in the McLean tax case. He went through with the agreement to do his job, and won a case that had very high stakes for the railroad. In regard to the research of Guzzini and Palestrini, Lincoln must receive a spillover in order for the Coase theorem to hold. This spillover could come in the form of a bonus for winning such a prominent case. The railroad did not. While the exact parameters of the retainer are not known, from previous cases it is known that the fees Lincoln charged the company varied. Lincoln, realizing the importance of winning a case that saved the railroad from paying taxes for six years, made a counter-move. He asked for an extraordinary $5,000 in legal fees. Ely puts this number in relative terms, “the governor of Illinois was $1,500 paid
annually and the members of the Illinois Supreme Court received $1,200 a year” (Ely, 2005, p.8). Now that is the railroad’s turn to respond, they chose to make just as a drastic decision by not compensating Lincoln whatsoever for his work.

Therefore, Lincoln brought the case to trial. Cooter and Ulen make mention of the possible entanglement between businesses (2010, p.242). They state that when this happens the court may change its focus from enforcing the proper rights of the parties to repairing the relationship by trying to promote a working relationship between the two in the future (Cooter and Ulen, 2010, p.242). This is precisely what happened. The jury awarded Lincoln $4,800, which the railroad promptly paid and did not appeal (Ely, 2005, p.8). Why the easy compromise? One reason could be the Illinois Central Railroad’s other pending lawsuit with the state tax auditor that required the legal counsel of Lincoln (Ely, 2010, p.9). Both parties were able to identify the potential for inefficiency that would accompany breaking their arrangement, and moved toward cooperation. Like Cooter and Ulen suggest, the court’s role pushed for them to repair their relationship.

In an ironic twist of fate, Lincoln had to rescind his offer to represent Morrison and yet again acted on behalf of the Illinois Central Railroad during the appeal. The original contract between the party of Morrison and Crabtree and the party of the Illinois Central Railroad Company had been to transport 400 cattle from Urbana to Chicago at a lower cost in return for releasing the railroad of all liability, except gross negligence. One cow died and many others had significant weight loss. Morrison and Crabtree sued and were awarded $1,200 in Coles County Circuit Court. The decision was appealed to the Illinois Supreme Court by Lincoln, but was remanded back to the lower courts with a reversed decision. Justice Breese wrote the opinion based on English and Eastern state precedents that
allowed for modifications to the common law rule of absolute liability in return for reduced rates. He stated, “Railroad companies could protect themselves from their absolute liabilities as common carriers by special contract. However, they could not restrict their liability from gross negligence or wilful [sic] misfeasance” (ICRRC v. Morrison and Crabtree 1857). Being remanded back to the lower courts, Steele and Summers used this statement as the basis for their argument and were eventually awarded $1,069 by a jury.

Remember that the Illinois Central Railroad had been struggling financially during the time of the Panic of 1857. They had been faced with multiple law suits with high costs. Just as Lincoln took on cases out of necessity, the railroad made an agreement with Morrison and Crabtree that they believed would protect their company from potential harm, while at the same time guaranteeing business. The agreement made between the two parties states that in return for a discount on shipping the cattle, Morrison and Crabtree agree to forgo the railroad's liability, except in instances of gross negligence. This is considered a filled gap within the contract. The details of the case explain that the reason the cattle had lost more weight than anticipated was because of engine failure en route. According to Cooter and Ulen, the gap was filled in this instance because the cost of negotiating a lower price and reduced liability in explicit terms was less than or equal to the cost of allocating the loss multiplied times the probability that a loss will occur (293). Given the terms of the agreement, “gross negligence” is not defined. It could be that the railroad, since they did not assume the same liability, was less careful with the shipment of cattle. However, given their economic situation it is hard to believe that the railroad would intentionally break the contract given that it appears to be a one-shot agreement with enforceable terms. Lincoln did not appeal the case for a second time, and the railroad paid
the plaintiffs. Cooperation in this case came in the negotiation of the terms, and not in the enforcement of them. Cooter and Ulen use the agency game from the field of game theory to further explain why the initial contract was made.

Figure 3. A depiction of the agency game incorporated with details from the case of Morrison and Crabtree v. ICRRC (1857).

Figure 3 depicts the agency game. In this game, Morrison and Crabtree represent the principal and the railroad represents the agent. If Morrison and Crabtree had decided not to ship the cattle, both the plaintiffs and the defendant would have walked away no better off. Since the plaintiffs decided to ship the cattle, follow the upper branch of the diagram. Morrison and Crabtree are, in essence, investing in the railroad. In exchange for a certain sum of money, they will eventually profit with the ability to sell their cattle to buyers in Chicago. If the railroad cooperates with the contract, they will deliver the cattle without gross negligence. In this scenario, the railroad would walk away with the value of the

- Reduced fare, 400 likely healthy cattle for sale
- (-$1,069, $1069 +399 somewhat ill cattle)
- (0,0)
reduced fare and the plaintiffs would walk away with 400 likely healthy cattle. The term “likely” is used because given the nature of railroad travel, which at times can be harmful to animals, there is a possibility of losing cattle or the health of cattle without gross negligence. Instead, the court ruled that the railroad breached the contract. The plaintiffs walk away with $1,069 and 399 living but sick cattle. The defendant is in the hole $1,069. The most efficient outcome of this game is the one with the highest total payoff, which is the total of the reduced fare plus the 400 likely healthy cattle. Since the negligence in this case is subjective, it is up to the courts to decide if the railroad cooperated or breached. Like Lincoln’s arguments and the decision of the Illinois Supreme Court, the more efficient decision in this case is to rule the railroad as compliant with the original contract.

Prior to the *Morrison* case, Lincoln showed a similar ability to switch sides in his dealing with the railroads. This case highlights Lincoln’s representation in one of Martin L. Bishop two complaints, one in April of 1854 and again in April of 1855. Each time the case was against the same defendant of the Illinois Central Railroad Company. In the April 1854 case, Bishop retained Lincoln to sue the railroad company for $5,000 in damages to his twenty acres of property under an action of Trespass. On April 20th, 1854 the dispute was heard by a jury. The jury awarded Bishop $583 in damages plus the costs of the court, which totaled $77.45. In a law journal titled, “New Common Law Causes,” the case of *Bishop v. Illinois Central Railroad Company* (1854) is listed as one that gets a second trial. The second trespass on property case is set on the docket for April 11th, 1855. Also on the docket for this day is a second *Bishop v. Central Illinois Railroad Company* (1855) case. This case listed was an action of assumpsit. Bishop did not get the total amount in damages of $5,000 as he had sued for. When the action of Trespass case went to a second trial, he also
filed another law suit in order to argue breach of contract, so that he could receive additional damages.

This is where things get interesting. Lincoln apparently had reservations about accepting this case against the railroad, mainly because Lincoln understood the economic inefficiencies of the case and the benefits from settling. Before the complaint made it to court, Lincoln and Stuart wrote a letter to “Friend Bishop” stating these concerns. They write,

...it will be impossible to build up any thing [sic] like a town on your farm. That if one were laid out there the only result would be to spoil a good farm and create a nuisance. We also think that under the estate of feelings existing between yourself and the Rail Road and much of which will in all probability continue to exist that the sooner you sell out and part company with them the better for you. (Collected Works of Abraham Lincoln Volume II)

Stuart and Lincoln argue that the damages Bishop seeks are on par with a remedy for a public bad. The railroad is, at best, causing a nuisance to his private property. The relationship between the two parties also appears to have history, so the attorneys advise immediate cooperation with railroad. Of course, the client has the final say in his own matter, and Bishop took this matter to court. Lincoln represented Bishop in the Trespass case, but when Bishop stubbornly pursued an action of Assumpsit, Lincoln chose to switch sides and represent the Railroad Company.
On Lincoln’s legal advice to encourage cooperation, the Trespass case was withdrawn with the note, “it is now considered by the Court that the said Plaintiff recover of said Defendant the sum of $470 in accordance with the terms of an arbitration heretofore agreed upon – and likewise the costs of this suit ($34.70).” The railroad company now only owes Bishop $504.70 from the property dispute. The Assumpsit case was ordered by the Court to continue. In a letter written by Stuart to Bishop the attorneys ask Bishop to detail the damages he sustained by the failure of the railroad to comply with their deed agreement with him. Stuart writes, “be particular to state the manner in which and the purpose for which the land is used by you and the manner in which you have been injured.” On September 9th, 1856 the case was dismissed at the cost of the defendant, a total of $6.95.

This case is full of duality: Lincoln as the prosecutor and defender, the case’s property and contract qualities, and the nature of settlement and court trials. No matter Lincoln’s role, he pushed for settlement. The Illinois Central Railroad Company had only begun five years earlier and it was backed by a government land grant. Five thousand dollars, even for a big business, was a lot of money for the time. Given the nature of Bishop’s complaint, $5,000 was inappropriately high. The jury agreed and granted a lower sum during the first trial. Once Lincoln left the prosecution, however, arbitration was used to bargain toward a more reasonable sum, one even lower than the jury decided. The discrepancy between the jury’s sum and the bargained sum highlight the inefficiency of the court to isolate the threat values of parties. Although there is a small transaction cost assumed by Lincoln’s defendant in the Assumpsit case (that could have been avoided
altogether through negotiation), it is minimal compared to the potential result of a jury granting Bishop the $5,000 in damages.

**Lincoln in the Role of Judge**

As previously mentioned, Lincoln served in many different legal capacities throughout his career prior to being elected president in 1861. All of the cases provided in the sample thus far have been examples of his work as an attorney. However, Lincoln also worked as a court reporter, witness, arbitrator, and judge. The cases previously mentioned in the sample show Lincoln’s attempts to either settle or limit the transaction costs associated with going to court. In these instances it is sometimes difficult to isolate the control that Lincoln had over the outcomes of the case. However, there are cases in which Lincoln had the final say on the matters at hand. These would be the cases where Lincoln was the judge. In the following three cases Lincoln acted as judge to settle contract disputes.

The first case of this sample in which Lincoln served as judge is *Ehrman v. Cyriax* (1858). Ehrman sued Cyriax for $200 because Cyriax did not pay for a skylight installment and painting work that Ehrman completed. In this case, Lincoln takes the approach to remedy Ehrman’s complaint by awarding him $167.08 plus the costs occurred by plaintiff by taking this matter to court. Notice that the judgment that Lincoln awarded is below the amount that Ehrman claimed his work was worth.

In a separate case, *Nutt v. Smith* (1854), Lincoln went about awarding damages in a different manner. Nutt sued Smith in order to collect a $300 debt. Lincoln, serving as judge, followed the jury’s recommendation awarded $306 to Nutt. The award reflects six more dollars than the original debt. Although there are not a lot of details associated with these
two cases, they both have very similar circumstances. Lincoln is the final voice on the matter in both, and they both involve recovering a debt. However, the nature of their outcomes ranges from not meeting the amount of the original debt to exceeding the amount of original debt. Recovery of debt and the awarding of damages is subjective. Sometimes, the court may deem it necessary to fully and additionally compensate the plaintiff, and sometimes the court may decide that part of the original contract was upheld, which means the full debt does not deserve to be recovered. The subjective nature of awarding damages creates an economic inefficiency that will be detailed in the next section.

Seeking legal remedy can come in two forms; through remedies, like all of the above sample cases suggest or through an injunction. According to the *Law Practice of Abraham Lincoln Glossary* (2009), an injunction is “an action to stop a specific activity.” The common form of remedy for a breach in contract is damages. However, in one case in which Lincoln acted as the judge, he took the alternative approach to remedy and issued an injunction. This case is *Peabody v. Roney* (1851). Peabody and Roney used to publish the *Illinois Herald* together. When they dissolved their partnership, Peabody sued Roney because he was still collecting money for subscriptions. There had to have been a mutual agreement between the two partners as a basis for running their business, an agreement that gave each of the partners rights to the publishing of the newspaper. Lincoln, as the judge, recognized that the partners’ rights in time of the combined ownership were shared, and therefore, when the partnership was dissolved, both parties were still entitled to the rights. According to Lincoln, Peabody's complaint to stop Roney from collecting money for subscriptions did not meet the shared ownership as guaranteed by the original agreement. Lincoln ordered as injunction to allow Roney to continue to collect subscription fees and also order the
plaintiff to pay all court costs. By ordering an injunction, Lincoln recognizes that there is an efficient use of money that comes the honoring of both parties’ rights to collect subscription fees. By agreeing with Peabody there could have been a loss of subscription fees that would have otherwise been collected by Roney. Lincoln moved to make the economically responsible decision.

Concluding the Sample

The cases discussed in the previous section represent the variety of contract cases that Lincoln took on during his time as an attorney. They prove both the success and failure of the court system to remedy breaches in contracts and debt repayment. The combination of the economic instability of the time and the rational decisions of Lincoln show his intent to limit costs, a technique that is consistent with the Coase theorem. Lincoln’s choice to waver back and forth between representing businesses and individuals demonstrate that his political loyalties did not interfere with his legal mission to represent his client.

Remedying the Inefficiencies

As previously mentioned, there are two kinds of remedies that are used by the courts, damages and injunctions. In contract disputes, the traditional route of remedy is through injunctions. However, looking at some of the cases in Lincoln’s contract case sample prove that there is inefficiencies associated with the costs of taking contract cases to court and remedying through damages. Instead of remedying contract cases with damages, it may prove to be more efficient if the legal system adopted a new norm: remedying through specific performance. This notion is detailed in Thomas Ulen’s article “The Efficiency of Specific Performance” (1984). Ulen defines specific performance as, “a judicial order requiring or forbidding him from performing the promise with any other
party” (Ulen, 1984, p. 364). Ulen gives four reasons why specific performance, on the grounds of efficiency, should be the routine contract remedy (Ulen, 1984, p. 365). The first reason is that parties that face the threat of specific performance, they will take greater consideration at the time of the formation of the original agreement to exchange promises that are reachable (Ulen, 1984, p. 365). The parties will face an incentive to allocate risks within the contract, because leaving the remedy up to the courts may threaten inefficiency to the parties (Ulen, 1984, p. 365). The second reason is that specific performance protects the subjective values of performance in the most efficient way (Ulen, 1984, p. 365). This ensures that a contract breach will only occur if it is truly efficient (Ulen, 1984, p. 365). The third reason is aligned with the Coase theorem. Ulen states, “the post-breach costs of adjusting a contract in order to move the promise to the highest-value user would be lower than under the most efficient legal remedy (Ulen, 1984, p. 365). This is because the value of performance is already within the parties’ negotiation of the original contract. The final reason is that because the transaction costs associated with the court’s purpose of deterring damage values, there is a possibility of undercompensating the innocent party through damages (Ulen, 1984, p. 366).

By starting a contractual agreement and relationship with clear and enforceable promises, the transaction costs associated with breach will be much lower. According to Ulen, if transaction costs are low between the two parties of an agreement, then the award of specific performance will urge the parties to transfer the right to performance at their own will and with efficiency (Ulen, 1984, p. 401). The transaction costs between the parties of a contractual agreement are likely to be low, since the relationship is forged willingly. This is unlike criminal law where the victim does not choose to be part of the crime. The
problem with the court awarding expectation damages, is that they often under award the victim because the costs associated with securing damages is often high (Ulen, 1984, p. 401). Sometimes the costs associated with expectation damages are based on probable outcomes, which are difficult to translate into dollar amounts.

Thomas Ulen points out that his hypothesis is a suggestion from the mind of an economist, and is not yet proven to be effective. However, this suggestion might correct some of Lincoln's failures to capture cooperative surplus. For example, in the case of Poor v. Stafford (1838), Poor (who was represented by Lincoln) sued Stafford for a breach in contract. Recall that the original contract called for an exchange of horses between the two men, and Poor paying Stafford $4. This agreement was contingent upon the promise that the horse Stafford was giving Poor was free from glanders. Poor claims that Stafford deceived him and knew that the horse had glanders and sold it anyway. Had specific performance been the routine remedy for breach, Stafford may not have deceivingly exchanged horses because the court would order him to give Poor a healthy horse before ever selling another horse again. Specific performance might be a more efficient legal remedy for breaches of contract. Specific performance supports the Normative Coase Theorem because it suggests the government should act in a way to lower transaction costs in order to encourage bargaining. If the court system (a part of the government) used specific performance as a routine remedy, the result would be contracts that are less likely to be breached and contracts that are enforceable. This would lead to an efficient allocation of resources.
Conclusion

Abraham Lincoln is a prominent figure in the history of the United States, and yet his legal career prior to his presidency is often ignored. Lincoln balanced a life as a representative, while learning from books to become a lawyer. This, however, wasn’t the ideal path to becoming an attorney, which may have led to his alternative approaches to settling disputes. As an attorney, Lincoln attempted to encourage out of court settlements that limited the costs of settling contract disputes. These techniques are similar to the theorem created by Ronald Coase that explained that when there are no transaction costs, rights would allocate efficiently despite the original assignment of them. This was a particularly strategy for the time era because of the financial panics of 1837 and 1857. Lincoln acted in many different roles and took on many different types of contract cases that prove his breadth and knowledge of the legal system. By examining a series of sample cases from the digitized collection found at the Law Practice of Abraham Lincoln, it is possible to show that while his cost minimization strategy was present, there were also times when the court system caused inefficiencies. Therefore, an application of the Normative Coase Theorem should be adopted for the government to lower transaction costs and lubricate bargaining in order to achieve efficiency. It is important to use Lincoln as the model for this argument because he faced the pressure of multiple financial crises and craftily used the legal system to achieve maximum monetary gain. James Ely quotes Herndon (Lincoln’s one time partner); Lincoln was not, it is generally admitted, well versed in legal technicalities and precedents; he argued from the logic of the facts and the principle of justice involved” (Ely, 2005, p.18). Lincoln was not your average antebellum attorney. He worked in a way that was more in tune with the methods of an economist, specifically
Coase. It is through these methods of game theory and cooperation that Lincoln leaves a
legacy, not as a president or attorney, but as a proponent of the field of law and economics
nearly a century before its creation.
References


from http://quod.lib.umich.edu/l/lincoln/
