

## Nothing into Something: Intrinsic Value and Counterfeit Money in Antebellum Law and Culture

Robert E. Mensel

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**Nothings into Something:  
Intrinsic Value and Counterfeit Money  
in Antebellum Law and Culture**

ROBERT E. MENSEL<sup>1</sup>  
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I. INTRODUCTION

The recent collapse of the market in financial derivatives has sharpened thoughtful Americans' skepticism about the nature of money and the reliability of its symbols. Even the nature of the substances that may serve

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as money is in flux, as electrum<sup>2</sup> has morphed into the electric.<sup>3</sup> One minor candidate for the presidency earnestly advocated a return to the gold standard,<sup>4</sup> apparently believing that gold alone has the intrinsic value needed to anchor a currency now otherwise unmoored. Others defend the unmooring, touting the usefulness of instruments conjured from other instruments. They claim that these contrivances help mitigate risk and mobilize capital.<sup>5</sup> The debate remains unresolved in many minds, but thoughtful people today seem intensely engaged in “questioning . . . every type of value.”<sup>6</sup>

The derivatives around which modern debate swirls are not new in concept, nor is the debate over the value they purport to embody. A modern derivative is “a tradable security whose value is derived from the actual or expected price of some underlying asset.”<sup>7</sup> The underlying asset might, itself, be a derivative.<sup>8</sup> Antebellum<sup>9</sup> bank notes, the subject of this article,

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2. An alloy of silver and gold. THE NEW OXFORD AMERICAN DICTIONARY 550 (2001).

3. MARC SHELL, MONEY, LANGUAGE, AND THOUGHT 4 (1982).

4. Christopher Caldwell, *Anti-Abortion, Anti-Drug Enforcement Administration, Anti-Medicare Candidacy of Dr. Ron Paul*, N. Y. TIMES, July 22, 2007, at 2, 4; RON PAUL, THE REVOLUTION: A MANIFESTO 137-157 (2009).

5. Michelle Clark Neely, *Demystifying Derivatives*, THE FEDERAL RESERVE BANK OF ST. LOUIS (1994), available at <http://stlouisfed.org/publications/re/articles/?id=1892>.

6. Harold James, *The Creation and Destruction of Value: The Globalization Cycle* 234 (2009).

7. *Derivative (financial)*, THE OXFORD DICTIONARY OF ECONOMICS (2002), available at <http://www.enotes.com/econ-encyclopedia/derivative-financial>; see Lydie Nadia Cabrera Pierre-Louis, *Controlling A Financial Jurassic Park: Obtaining Jurisdiction Over Derivatives by Regulating Illegal Foreign Currency Boiler Rooms*, 8 U.C. DAVIS BUS. L.J. 35, 38 (2007) (“A derivative is a financial instrument that derives its value from an underlying asset, index, or rate.”); Norman Menachem Feder, *Deconstructing Over-the-Counter Derivatives*, 2002 COLUM. BUS. L. REV. 677, 681 (2002) (describing derivatives as “financial products whose structures and values refer to financially meaningful external items”); Adam R. Waldman, Comment, *OTC Derivatives & Systemic Risk: Innovative Finance or the Dance into the Abyss?*, 43 AM. U. L. REV. 1023, 1027 (1994) (defining derivative as a “financial contract that ‘derives’ its value in whole or in part from the performance of an underlying asset, including securities, currencies, rates, or indices of asset values.”). Newsday reported that “derivatives are contracts in which two parties agree to pay one another an amount based on changes in some financial measure, such as an interest rate, a currency exchange rate, an index of securities prices or even a country’s gross domestic product.” David Henry, *Risk Management Derivative Doctors*, NEWSDAY, Jan. 29, 1995, at 1-2. Antebellum bank notes derived their value from the specie on which they were based in the early part of the period under study, and from the securities upon which they were based in the later part of the period. Warren E. Weber, *Were U.S. State Banknotes Priced as Securities?*, FEDERAL RESERVE BANK OF MINNEAPOLIS RESEARCH DEPT. STAFF REPORT 344 2 (Revised 2005).

8. JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY 169-74 (2010); Lynn A. Stout, *Why Re-regulating Derivatives Can Prevent Another Disaster*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (2009), available at <http://blogs.law.harvard.edu/corpgov/2009/07/21/how-deregulating-derivatives-led-to-disaster/>.

9. I use the term “antebellum” throughout this article to refer generally to the period between the ratification of the Constitution and the Civil War. THE NEW OXFORD AMERICAN DICTIONARY 65 (2001). In doing so I ignore the more common periodization that separates the early republican period

were paper obligations issued by private banks. They circulated as money throughout the United States until they were replaced with the greenbacks created by Congress to fund the Civil War.<sup>10</sup> According to the modern definition, they were surely derivatives. Like modern derivatives, they generally appeared to be legitimate, but sometimes had no real value underwriting them.

Popular discourses about the unreliability of bank notes were often expressed in the language of the intrinsic and the counterfeit. These discourses conflated concerns about counterfeiting of bank notes, on the one hand, and counterfeiting of value, on the other. Concerns about counterfeiting of bank notes are, to some extent, self-explanatory. Concerns about the counterfeiting of value arose in part from a characteristic shared by antebellum bank notes and modern derivatives. These wands of increase share an alchemical potency that multiplies the creative powers of capital. They serve as a means by which financial institutions lend more money than they have. During the antebellum period, the multiplier was limited to two or three.<sup>11</sup> Modern derivatives and other complex financial instruments have increased the multiplier to as much as forty.<sup>12</sup>

Today, as in the antebellum period, fears of illusory value and counterfeit instruments pervade the public discourse.<sup>13</sup> In the earlier period, the roar of objection to bank notes diminished after the public came to accept the new notion of value on which they were based, and after they were regulated effectively by some of the states. Whether an analogous situation will eventually obtain with respect to modern derivatives remains to be seen. Influential and well-informed voices call persistently for such regulation.<sup>14</sup> Perhaps, as the great Yogi Berra observed in a different context, it will indeed be “deja vu all over again.”<sup>15</sup>

This article suggests that antebellum concerns about counterfeiting, though framed in terms invoking the currency, in fact arose from larger concerns about what is characterized herein as the counterfeiting of value. A great deal of the hysteria thought to have arisen from the counterfeiting of currency ought more accurately to be attributed to the counterfeiting of

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from the antebellum period. I do so merely for purposes of convenience, and not to deny or ignore well-recognized differences in the two periods. For purposes of this article those differences are unimportant.

10. Act of Feb. 25, 1862, ch. 33, 12 Stat. 345 (1862).

11. ALEXANDER HAMILTON, TREASURE REPORT ON A NATIONAL BANK (1790), *reprinted in* HERMAN E. KROOSS, I DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES 230, at 231 (1969).

12. STIGLITZ, *supra* note 8, *passim*.

13. PAUL, *supra* note 4; Neely, *supra* note 5.

14. STIGLITZ, *supra* note 8, *passim*.

15. YOGI BERRA, THE YOGI BOOK: “I REALLY DIDN’T SAY EVERYTHING I SAID,” 30 (1998).

value.<sup>16</sup> Concerns about value arose from changes in the model of exchange prevailing in the country, from an older model conceptually similar to barter<sup>17</sup> to a newer model based upon credit and confidence.<sup>18</sup> Under the first, value was exchanged for value. Under the second, value was exchanged for a promise--for credit. Each model depended upon and enacted a very different concept of money, and the change caused disorientation and conflict.

Counterfeiting of currency, in its ordinary sense, was neither as widespread nor as important as contemporaries and historians have thought. Its importance lay primarily in its rhetorical invocation in counterpoint to the concept of intrinsic value. The idea of intrinsic value had both aesthetic and economic dimensions. In each of these senses, it captured the longing for certainty and reliability in commerce and political economy.<sup>19</sup> The primitive belief that gold and silver had value intrinsic to themselves answered that longing and provided a foundation for the currency required under the old model of exchange. "Counterfeit" in antebellum discourse expressed the sense of illegitimacy associated with the abandonment of the intrinsic and the embrace of confidence and credit.<sup>20</sup>

Over time credit prevailed and redefined the intrinsic in its image. Concerns about both species of counterfeiting were allayed, in part by that redefinition and in part by state legislation that standardized aesthetics and strengthened security requirements supporting bank notes. The standardizing of aesthetics was as important as the strengthening of security in reducing public concern about counterfeiting. Together they paved the

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16. THEOPHILUS FISK, *THE BANKING BUBBLE BURST* 41 (1837). Modern historians appear to conflate the two, and so overstate the problem of counterfeiting of currency. STEPHEN MIHM, *A NATION OF COUNTERFEITERS* 73 (2007); *see generally* MARK C. TAYLOR, *CONFIDENCE GAMES* 15-77 (2004); STEVE FRASER, *EVERY MAN A SPECULATOR* 68-98 (2005); DAVID M. HENKIN, *CITY READING* (1998); LYNN GLASER, *COUNTERFEITING IN AMERICA* (1968).

17. For a discussion of the early American barter economy *see* Christopher Clark, *Household Economy, Market Exchange, and the Rise of Capitalism in the Connecticut Valley*, 13 J. SOC. HIST. 169, 173-175 (1979) (suggesting that barter continued as an important system of exchange in rural America as late as the early 1860s); *See also* James A. Henretta, *Families and Farms: Mentalite in Pre-Industrial America*, 35 WM. & MARY Q. 3, 15-17 (1978) (suggesting that the family remained the central institution throughout the transition from the barter economy to the commercial economy).

18. DAVIS R. DEWEY, *FINANCIAL HISTORY OF THE UNITED STATES* 243-246 (1968); BEJAMIN KLEBANER, *COMMERCIAL BANKING IN THE UNITED STATES* 77-78 (1974); REGINALD MCGRANE, *THE PANIC OF 1837: SOME FINANCIAL PROBLEMS OF THE JACKSONIAN ERA* 1-42 (1924) (discussing the expansion of credit and borrowing during the Jacksonian era).

19. *But see* HAROLD JAMES, *THE CREATION AND DESTRUCTION OF VALUE: THE GLOBALIZATION CYCLE* 234 (2009).

20. *See infra* notes 155-73.

way for the Civil War greenbacks, the true fiat money that has circulated in this country since 1863.<sup>21</sup>

Part II herein describes the manner in which banks conducted business in the antebellum period. It links the methods of production of bank notes to the problem of counterfeiting currency. It then challenges prevailing ideas about the extent of counterfeiting of currency, suggesting that it was much less a problem than historians have thought. Counterfeiting received so much attention from contemporaries because it provided a vocabulary with which to express their objections to subversive changes in the meaning of value. Part II also analyzes briefly the regulation of counterfeiting under the criminal law, and challenges an earlier interpretation suggesting that the courts implicitly countenanced counterfeiting by enforcing the law lackadaisically. Part III explores from legal and anthropological perspectives the functions and sources of money in the early republican and antebellum periods. It then explores counterfeiting as a concept with meanings that extended far beyond the simulacra of authentic circulating currency. The term “counterfeit” signified the central concept in traditionalist objections to fundamental changes then occurring in the American economy.

Part IV analyzes popular rhetoric that condemned banking as counterfeiting and bankers as counterfeiters. Part V explains how credit and confidence displaced intrinsic value in the public mind, and then came to be considered as, themselves, having intrinsic value. It then analyzes the most

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21. The discussion herein is based on three assumptions, all worth articulating explicitly. First, broad assertions about the concerns of an age stand on firmer ground when based on sources of different types. See STEPHEN KERN, *THE CULTURE OF TIME AND SPACE, 1880-1918*, at 7 (1983). This assumption underlies the use herein of sources beyond judicial opinions and statutes, including articles in mercantile magazines, antebellum economic theory and political commentary, and popular fiction of the period. The second assumption, more widely held but still worth articulating explicitly, is that the concerns expressed by and the rhetoric used by public leaders and commentators, including judges, tend to reflect the widely shared concerns, beliefs, and values of their audiences. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 849 (1978). The evidence herein goes beyond the rhetoric of judges and politicians and includes that of such antebellum notables such as Charles Francis Adams, Freeman Hunt, William Leggett, Herman Melville, Hezekiah Niles, Edgar Allan Poe, and others. The third assumption seems to contradict the first two. Cultures are never monoliths. Widely shared beliefs are not universally shared beliefs and sometimes, as discussed below, they conflict sharply with one another. Sometimes the significance of historical events is the cultural confusion they illustrate. Sometimes there is no consistent reading to be given to an important aspect of a culture. As the social historian James A. Henretta has observed, “Social or cultural change is not always systemic in nature, and it proceeds in fits and starts. Old cultural forms persist (and sometimes flourish) within new economic structures.” Henretta, *supra* note 17, at 25 (parentheses in original). Such halting change creates conflict within a culture and ambiguity in the historical record it generates. For a similar approach to a different aspect of the confusion of antebellum law and culture see Robert Mensel, “*A Diddle At Brobdingnag*”: *Confidence and Caveat Emptor During the Market Revolution*, 38 *U. MEM. L. REV.* 97 (2007).

successful statutory responses to all forms of antebellum counterfeiting, the Free Banking Laws adopted by many states. Those laws succeeded in large measure in stabilizing the notes issued by banks under their jurisdiction. They did so first by requiring that the promises represented by those notes be reliable, and, second, by standardizing the aesthetics of the notes themselves.

## II. BANKING AND COUNTERFEIT CURRENCY

### A. *The Business of Banking*

Before the 1850s, in most states, banks were created by special acts of state legislatures called charters.<sup>22</sup> A charter was legislation, a sort of private law, that permitted persons named therein to form a specifically identified bank and to assemble a stated amount of capital, usually in the form of specie.<sup>23</sup> Once capitalized, a bank might begin lending.<sup>24</sup>

A simple bank loan might have been made generally as follows. A borrower might come to the bank for a loan of, for example, one thousand dollars. He would agree to pay that amount at a certain date in the future. In return for this agreement, the bank might open a credit account in the amount of \$970, or hand over bank notes in that amount, with the discount approximately representing the three percent interest he had agreed to pay for the loan.<sup>25</sup> In either case he would in time spend the notes as cash. Each note represented the bank's promise to the bearer and implied the original borrower's promise to the bank. The notes would circulate as money until they were presented to the bank for payment in specie.

The method by which bank notes were produced, called by contemporaries the "patch-work" system, contributed to some extent to the problem of counterfeiting.<sup>26</sup> Text was pressed "upon paper of a peculiar quality, [and] embellished and distinguished by vignettes and other ornamental engraving[.]"<sup>27</sup> Notes were made, not from one plate engraved with the note's whole intended image, but from several plates, each of

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22. BRAY HAMMOND, *BANKS IN POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 65-67 (1957).

23. *See, e.g.*, 1834 N.Y. Laws page no. 386.

24. *Id.*; 1841 Pa. Laws page no. 337, § 4.

25. The rate of 3% is offered solely by way of illustration. *See* CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846*, 45-46 (1991).

26. W.L. ORMSBY, *A DESCRIPTION OF THE PRESENT SYSTEM OF BANK-NOTE ENGRAVING SHOWING ITS TENDENCY TO FACILITATE COUNTERFEITING: TO WHICH IS ADDED A NEW METHOD OF CONSTRUCTING BANK NOTES TO PREVENT FORGERY* 67 (1852).

27. *Tower v. Appleton Bank*, 85 Mass. 387, 389 (1862).

which bore the image of one portion of the note.<sup>28</sup> Each legitimate note received several partial imprints, each at a different time.<sup>29</sup> Partial plates were interchangeable and could be varied “by merely changing plugs of steel”<sup>30</sup> in the press. Portions of notes could be bleached, and that portion of the note reprinted with a partial plate.<sup>31</sup> When legitimate engraving houses failed their plates were subject to auction by creditors. Anyone could purchase them.<sup>32</sup> Counterfeits and sham notes could be assembled from partial plates of entirely separate notes.<sup>33</sup> The patch-work system enabled a counterfeiter to produce high quality work because he was able “to obtain on his counterfeit plates, the genuine work of the best Artists in the Country[.]”<sup>34</sup>

### B. The Crime of Counterfeiting

The general use of bank notes as currency invited counterfeiting. Every state legislature joined Congress in outlawing the making and intentional passing of counterfeit currency.<sup>35</sup> Counterfeiting constituted a number of discrete wrongs, itemized in an opinion issued by South Carolina’s high court in a state prosecution for passing counterfeit notes of the second Bank of the United States:<sup>36</sup>

The offence against the Government of the United States consists in discrediting its currency. That against the State in defrauding its citizens. The offence against the State is certainly of the more palpable and dangerous character. . . . The injury to the bank, of circulating forged paper is, that its genuine paper may be discredited, and its circulation impeded. But this cannot take place to a great extent [in the case of this particular bank],<sup>37</sup> and is trifling, compared with the injury a State may sustain, if it be deprived of the power of protecting its citizens from being

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28. ORMSBY, *supra* note 26, at 8-9.

29. *Id.*; *Making Money. III.-The American Bank Note Company*, 24 HARPER’S NEW MONTHLY MAG. 306, 318-19 (1862).

30. ORMSBY, *supra* note 26, at 41.

31. *Id.* at 2.

32. *Id.* at 69-70.

33. *Id.* at 46, 85.

34. *Id.* at 77.

35. *United States v. Marigold*, 50 U.S. 560, 567-569 (1850); Crimes Act of March 3, 1825, ch. 65, § 20, 4 Stat. 121 (1825).

36. *State v. Tutt*, 18 S.C.L. 44 (2 Bail.), 1830 WL 1620, at \*2 (S.C. App. 1831).

37. The court here implies that, with respect to the second Bank, such a dire outcome was not likely, given that bank’s capitalization and influence on the market. For the definitive history of the second Bank of the United States see HAMMOND, *supra*, note 22, at 233-499.

inundated by a spurious currency; injuring their property, depraving their morals and embarrassing their intercourse.<sup>38</sup>

Enforcement of counterfeiting laws, despite Professor Mihm's suggestion to the contrary, appears to have been consistent with the generally haphazard enforcement of the criminal laws during the first half of the century. Mihm's assertion that the law somehow countenanced counterfeiting is based upon anecdotal evidence.<sup>39</sup> The evidence to be found in sources more reliable than anecdote,<sup>40</sup> though not dispositive, suggests that counterfeiting laws were neither more nor less strictly enforced than other criminal laws.<sup>41</sup> Indeed, if reported cases offer a useful database, it might appear that the appellate courts were stricter with counterfeiters than with other criminals. Of 120 reported appeals of counterfeiting convictions for the period from 1800 to 1865, only 37.5% were reversed.<sup>42</sup> This compares to a 44.4% reversal rate for embezzlement convictions and 49.4% reversal rate for arson convictions.<sup>43</sup> This is not to suggest that any definitive conclusion can be drawn from these data. It is merely to suggest that any conclusion that courts neglected or refused to enforce counterfeiting laws contradicts the slender empirical evidence available.

### C. *The Extent of Counterfeiting*

The extent of counterfeiting, as an empirical matter, is a critical element in the historiographical argument about its significance. If, as Lynn Glaser suggests, counterfeiting could reasonably be characterized as "an American way to wealth,"<sup>44</sup> or if it could reasonably support the broad allegation that capitalism is a confidence game, it must have been quite pervasive.<sup>45</sup> Clearly Glaser assumes so, asserting, with no empirical data, that

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38. *Id.*

39. *See*, MIHM, *supra*, note 16, at 73.

40. LOUIS NEWTON ROBINSON, HISTORY AND ORGANIZATION OF CRIMINAL STATISTICS IN THE UNITED STATES 1-11 (1911).

41. *Id.*

42. The analysis was based upon cases reported in the Lexis Nexis database. The data pool was limited to the following criminal offenses within the sub-heading of property crimes: (i) Arson, (ii) Embezzlement, and (iii) Forgery (Counterfeiting). An examination of the 83 arson convictions within the search parameters revealed a 49.4% conviction reversal rate with 46.3% of those reversals being remanded for a new trial. A parallel examination of 45 embezzlement convictions revealed a 44.4% reversal rate with 45% of those being remanded for a new trial. These reversal and remand rates align with the 120 counterfeit convictions, which had a 37.5% reversal rate with 51.1% of those reversals being remanded.

43. *Id.*

44. GLASER, *supra* note 16.

45. MIHM, *supra* note 16, at 11.

“[p]roportionately, there were approximately as many counterfeits as notes on sound banks, and a mass of paper which had little more authority than IOU’s.”<sup>46</sup> Precisely what was meant by “proportionately” does not appear clearly in Glaser’s monograph and, of course, bank notes were by their nature “IOU’s.”

David Henkin asserts that, by 1862, 80% of all notes circulating in New York were counterfeit.<sup>47</sup> Unfortunately, his misreading of his source has led him to exaggerate wildly the extent of the problem. The *New York Times* article on which he relies quite clearly reports that 80% of the *types* of notes in circulation had been the targets of counterfeiters.<sup>48</sup> Stephen Mihm joins Glaser and Henkin in the conclusion that counterfeiting was pervasive. Careful to avoid any definite estimates of the extent of counterfeiting or the numbers of counterfeiters, he nevertheless leaves the reader with the impression that counterfeiters were legion and the currency was substantially counterfeit.<sup>49</sup>

Aside from the absence of and misreading of evidence, there are other reasons, both empirical and theoretical, to doubt that counterfeiting was the empirical problem suggested in the previous treatments of the issue. First, the Secretary of the Treasury, Levi Woodbury, issued a report in 1841 estimating the losses arising from defects in the banking system, including counterfeiting, from 1789 to that date.<sup>50</sup> Of all the losses calculated by the Secretary, counterfeiting of bank notes caused the least.<sup>51</sup>

Woodbury acknowledged that the available data were not as good as he would have preferred, and that others might offer higher estimates.<sup>52</sup> Even so, he estimated that counterfeiting of bank notes accounted for the loss on average of only one cent per person per year in the United States.<sup>53</sup> It had caused only approximately \$4.4 million dollars in losses, according to the report.<sup>54</sup> This loss was less than the \$7.1 million in accidental loss or destruction of bank notes caused, for example, by fire or by the sinking of passenger ships.<sup>55</sup> It was vastly less than the \$96.7 million in losses occasioned by suspension and depreciation of notes<sup>56</sup> or the \$108 million in

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46. GLASER, *supra* note 16, at 78.

47. HENKIN, *supra* note 16, at 145.

48. Counterfeiting, N.Y. TIMES, Jul. 30, 1862 at 1.

49. MIHM, *supra* note 16, *passim*.

50. S. Doc. No. 180 (1841) (hereinafter Woodbury Report, with internal pagination).

51. *Id.* at 14.

52. *Id.* at 12.

53. *Id.* at 13.

54. *Id.* at 12.

55. Woodbury Report, *supra* note 50, at 14.

56. *Id.* at 6.

losses caused by bank failures.<sup>57</sup> The Treasury's data ought not be taken as precise or dispositive, but surely they are better than the anecdotes upon which historians have heretofore relied.

There are additional reasons to doubt that counterfeiting was the pervasive problem many have suggested. The most compelling is that, to the extent Gresham's Law distinguishes authentic currency from counterfeit, the counterfeit would tend to drive the authentic out of circulation and into the hands of hoarders.<sup>58</sup> This would be especially true of counterfeits in the antebellum period for two related reasons. First, although counterfeits were seized from criminals,<sup>59</sup> they were not generally seized from innocent holders until 1876, when counterfeit currency was made contraband by act of Congress.<sup>60</sup> Second, during the antebellum period it was customary in the market and mandatory as a matter of law to return money discovered to be counterfeit to the person from whom one received it, as a condition of a demand for refund.<sup>61</sup> This explains Professor Mihm's observation that "most counterfeits remained in circulation."<sup>62</sup> The upshot of Gresham's Law in this context is that the extent of counterfeiting is very likely to be overstated.

In addition, the perceptions of contemporaries were surely influenced by newspaper coverage of counterfeiting and counterfeiters. It was not unusual for newspapers and merchants' magazines to report the arrest of one counterfeiter for passing one or two counterfeit notes. If, as Niles' Weekly Register suggested, twenty or twenty-five counterfeits in the possession of one criminal was "a large number,"<sup>63</sup> historians might

57. *Id.* at 7.

58. Arthur T. Rolnick & Warren E. Weber, *Gresham's Law or Gresham's Fallacy?*, 94 J. POL. ECON. 185 (1986) (stating Gresham's Law as "bad money drives out good money," meaning from circulation, and suggesting modifications applicable to bimetallism that do not apply in the case of counterfeits). See also *State v. The Bank of South Carolina*, 28 S.C.L. (1 Speers) 433, 1843 WL 2480, at \*17 (S.C. Err. 1843) (Argument of the Attorney General) ("[T]he operations of a bank of circulation tend inevitably to drive specie from general circulation . . .").

59. See, e.g., *New Counterfeit Bank Bills and Arrest*, N.Y. TIMES, Dec. 13, 1851, at 2.

60. 44 Cong. Ch. 156, 19 Stat. 63, 64 (1876).

61. For example, see *Markle v. Hatfield*, 2 Johns. 455, 459 (N.Y. Sup. Ct. 1807) (Kent, C.J.) (tender of return required); 15 NILES' WKLY. REG. 361 (1819); *Gloucester Bank v. Salem Bank*, 17 Mass. 33, 43-45 (1820); *Curcier v. Pennock*, 14 Serg. & Rawle 51, 55, 59 (Pa. 1826) (citing *Young v. Adams*, 6 Mass. (1 Tyng) 182 (1810); *Pindall's Ex'rs v. Northwestern Bank*, 34 Va. 617, 621-622; *Rick v. Kelly*, 30 Pa. 527, 530-531 (1858); *Johnson v. Alabama*, 35 Ala. 370, 1860 WL 428, at \*2 (1860).

62. MIHM, *supra* note 16, at 7, fig. 2.

63. 15 NILES' WKLY. REG. 362 (1819). See N.Y. TIMES, Sept. 30, 1851, at 1 (reporting the arrest of two men for passing one counterfeit five dollar note); N.Y. TIMES, Dec. 4, 1852, at 1 (reporting the arrest in Philadelphia of one man for passing two counterfeit ten dollar notes); N.Y. TIMES, Oct. 1, 1853, at 3 (reporting the arrest of one woman for passing one counterfeit ten dollar note); N.Y. TIMES, April 16, 1856, at 3 (reporting the arrest of one woman for passing one five dollar note of a type previously reported to have been in circulation).

reasonably be accused of overstating the problem. It is difficult to separate reality from hysteria in these portions of the historical record.

Finally, the tone of the modern historiography of counterfeiting partakes entirely too much of the gleeful tone of antebellum fictional representations of the “confidence man.”<sup>64</sup> Much of that literature presents confidence men as comic figures and merchants as dupes and simpletons.<sup>65</sup> One reviewer of Melville’s *The Confidence Man* characterized it whimsically as another installment in “the romance of roguery.”<sup>66</sup> That same tone is evident in Glaser’s work<sup>67</sup> as well as in Mihm’s social history of a few larger-than-life characters who made their careers counterfeiting and dodging the authorities.<sup>68</sup> Literary convention appears to have become conflated with empirical fact.

This is not by any means to suggest that counterfeiting, understood in its traditional sense, was not a problem in antebellum America. Counterfeits were one type of the broader category of bogus paper currency circulating in America. There were also bank notes issued by legitimate banks that later failed,<sup>69</sup> notes bearing the names of banks that never existed,<sup>70</sup> and notes issued by banks with a lawful existence but without real assets.<sup>71</sup> The costs of counterfeiting were more social than economic, however. The possibility that notes received in the course of commerce might be counterfeit diminished confidence in the currency as well as confidence “between man and man.”<sup>72</sup> It contributed to a pervasive sense of unreliability in the institutions of commerce.

No accurate empirical measure of counterfeiting will ever be possible. Even so, the historical record might well be read to suggest that its chroniclers have adopted as an historiographical conclusion the hysteria of

64. The role of fraud, confidence men, and confidence women as constitutive of American culture had long been an interest of literary critics. See LORI LANDAY, *MADCAPS, SCREWBALLS, AND CON WOMEN* 22-24, 32-46 (1998); WILLIAM E. LENZ, *FAST TALK AND FLUSH TIMES* 62 (1985); GARY LINDBERG, *THE CONFIDENCE MAN IN AMERICAN LITERATURE* 3 (1982); RICHARD BOYD HAUCK, *A CHEERFUL NIHILISM* 8-9 (1971).

65. Edgar Allan Poe’s story *Diddling Considered as One of the Exact Sciences* is the most accessible example. See Edgar Allan Poe, *Diddling Considered as One of the Exact Sciences*, *BROADWAY JOURNAL*, Sept. 13, 1845, at 2, 145-148. See also HERMAN MELVILLE, *THE CONFIDENCE MAN* 111 (Herschel Parker, ed., Norton Critical Ed. 1971). See also LANDAY, *supra* note 64, at 22-24, 32-46; LENZ, *supra* note 64, at 62; LINDBERG, *supra* note 69, at 3; HAUCK, *supra* note 64, at 8-9.

66. MELVILLE, *supra* note 70 (citing a review from the Boston Evening Transcript, Apr. 10, 1857).

67. GLASER, *supra* note 16, at 78.

68. MIHM, *supra*, note 16, at 73.

69. WILLIAM H. DILLISTIN, *BANK NOTE REPORTERS AND COUNTERFEIT DETECTORS, 1826 – 1866*, at 16-25 (1949).

70. *Id.*

71. *Id.*

72. MELVILLE, *supra* note 65, at 111.

the era under study. Measured by the losses it caused, it was probably only a minor problem.<sup>73</sup> Why, then, did it receive such attention from contemporaries? The answer lies in the change in the meanings attributed to money.

### III. THE MEANING OF MONEY IN THE ANTEBELLUM ECONOMY

#### A. *The Nature and Sources of Money*

Anthropologists consider money to be a system of meaning, as are logic, language, and weights and measures.<sup>74</sup> As a system, money expresses symbolically the relative levels of power within a society.<sup>75</sup> Since the Lydians first coined gold into circulating currency,<sup>76</sup> items and substances of rarity and beauty have been used as tokens of money.<sup>77</sup> It is not a coincidence that tokens of money have served in many societies as personal adornments as well.<sup>78</sup>

Such tokens as shells, beads, and gold and silver coins are generally conflated with the system of meaning of which they are the tangible representatives.<sup>79</sup> Useless in themselves, they become invested with notions of value nevertheless, and the value ascribed to them is mistaken for intrinsic value. In other words, they become fetishes,<sup>80</sup> things “worshiped in their own character, not as the images, symbols, or occasional residences of a deity”<sup>81</sup> or some other power. The beautiful stuff of money becomes money in the public mind. The early republican and antebellum periods were not exceptions.<sup>82</sup> Aesthetics coincided with authenticity as well as with the ascribed value mistaken for intrinsic value.

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73. S. Doc. No. 180, at 4 (1841) (hereinafter Woodbury Report, with internal pagination).

74. KARL POLANYI, *PRIMITIVE, ARCHAIC, AND MODERN ECONOMIES: ESSAYS OF KARL POLANYI*, 175 (1968); *MONEY, LANGUAGE, AND THOUGHT*, *supra* note 3, at 4.

75. Helen Codere, *Money-Exchange Systems and a Theory of Money*, 3 *MAN, NEW SERIES* 557, 561 (1968) (defining money as a symbolic system ordering “varying degrees of symbolic power”).

76. MARC SHELL, *THE ECONOMY OF LITERATURE* 12 (1978).

77. *See id.*

78. David Graeber, *Beads and Money: Notes Toward a Theory of Wealth and Power*, 23 *AM. ETHNOLOGIST* 4, 12 (1996).

79. *See id.* at 4.

80. *See generally*, Roy Ellen, *Fetishism*, 23 *MAN, NEW SERIES* 213, 218 (1988) The concept of the fetish is familiar to students of anthropology, Marxian economics, and Freudian psychoanalysis. Fetishes express or embody the belief that certain things, such as a magic wand, a dream catcher, a witch’s broom, or a gold coin, have power in themselves. *Id.* at 215. Belief in fetishes is a product of cognitive processes, including the attribution of human characteristics to things, “the concretisation of abstractions” and the “conflation of signifier and signified.” *Id.* at 218-219. Such belief appears to answer an emotional longing as well. It is endemic to human societies.

81. MARC SHELL, *ART & MONEY* 57 (1995).

82. David Ricardo, *The High Price of Bullion: A Proof of the Depreciation of Bank Notes*, *Q. REV.* 1, 14 (1810).

Money played the same role in the antebellum market that it has played and continues to play in most societies.<sup>83</sup> Most importantly, it served as a medium of exchange: “[M]oney means anything which passes current as the common medium of exchange and measure of value for other articles.”<sup>84</sup> As a contributor to Freeman Hunt’s *Merchants’ Magazine and Commercial Review* noted:

The indispensable attribute of money is convertibility into any and every article wanted, whether by the pleasure, or caprice, or convenience of the holder. In order to this [sic], it must also be divisible to the extent necessary to accommodate a purchase, whether it be very small or very large.<sup>85</sup>

These functions of money were widely understood in antebellum America. Even Thoreau’s rustic friend the woodchopper had an understanding of money that rivaled that of the philosophers.<sup>86</sup>

The United States Constitution delegates to Congress the authority “to coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures,” and forbids the states to do so.<sup>87</sup> The

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83. Antebellum ideas about the functions of money foreshadowed the more deliberate analysis of the late-century anthropologist W. Stanley Jevons. Jevons saw money chiefly as an answer to the logistical difficulties of a barter economy, and framed its functions in those terms. Money serves (1) as a measure of value, permitting subdivision of units of value to facilitate exchange (W. STANLEY JEVONS, *MONEY AND THE MECHANISM OF EXCHANGE* 4-5 (1919)), (2) as a medium of exchange, particularly useful in bridging gaps in the times at which goods subject to exchange become available (*id.*), (3) as a store of value, permitting wealth to be moved conveniently from place to place without regard to any particular transaction or exchange, (*id.* at 6), and (4) as a standard of value by which the value of future contractual obligations could be made consistent and predictable. Items that served any of these purposes could be considered money. *See id.* Jevons’s formulation remains the standard in the anthropological literature. Codere, *supra* note 75, at 557-58.

84. *Maynard v. Newman*, 1 Nev. 271, 4 (1865). *See also* *Craig v. Missouri*, 29 U.S. 410, 452, 457-58, 460 (1830).

85. Freeman Hunt, 1 HUNT’S MERCHANTS’ MAG. 121 (1839).

86. HENRY DAVID THOREAU, *WALDEN, OR LIFE IN THE WOODS* 118-119 (1854) (“When I asked him if he could do without money, he showed the convenience of money in such a way as to suggest and coincide with the most philosophical accounts of the origin of this institution, and the very derivation of the word pecunia.” *Id.* at 161-62).

87. U.S. CONST. art. I, § 8, cl. 5 (delegating to Congress the authority “To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures); U.S. CONST. art. I, § 10, cl. 1 (“No State shall...coin Money; emit Bills of Credit, make any Thing but gold and silver Coin a Tender in Payment of Debts”); U.S. CONST. art. I, § 8, cl. 6 (authorizing Congress “To Provide for the Punishment of counterfeiting the Securities and current Coin of the United States”); *United States v. Marigold*, 50 U.S. 560, 567-569 (1850) (upholding constitutionality of federal statute, Crimes Act of March 3, 1825, ch. 65, § 20, 4 Stat. 121, criminalizing the counterfeiting and passing of counterfeit federal currency). Scholars today contest the meaning in 1789 of the word “coin,” but there is no doubt that it included symbols stamped out of gold or silver and bearing a stated value that corresponded at least roughly to the bullion value of the metal in the coin. Robert G. Natelson, *Paper Money and the*

immediate proximity of the coining and weights and measures clauses vindicates the anthropologists and suggests that the Founders themselves conceived of exchange involving money as an attenuated form of barter.<sup>88</sup> The purpose of the constitutional authority was to “creat[e] and maintain[] a uniform and pure metallic standard of value”<sup>89</sup> as a matter of public necessity.<sup>90</sup> The purpose of the constitutional prohibition was “to give the United States the exclusive control over the coining and valuing of the metallic medium. That [sic] the real dollar may represent property, and not the shadow<sup>91</sup> of it.”<sup>92</sup>

Gold and silver coin were referred to as “specie” during this period.<sup>93</sup> By its nature as a metal thought to possess intrinsic value, specie satisfied everyone as a medium of exchange.<sup>94</sup> The text it bore conveyed both a simple and a complex message. In simple terms it guaranteed the weight and purity of the bullion into which the text was stamped, and so confirmed both its currency value and its bullion value.<sup>95</sup> In that sense it did little more than signify itself. On the other hand, the text also served a grander function, implying a portion of the social compact itself: that the bearer of the bearer of the text might presumptively exchange the coin for its stated value in goods.<sup>96</sup> In this respect, coin was a signifier of something far greater than itself.

The United States never minted sufficient specie to satisfy the market’s need for a medium of exchange.<sup>97</sup> The American economy suffered from a chronic shortage of gold and silver bullion because, for most of the antebellum period, the United States was a net importer of goods and

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*Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1019-1022, 1036 (2008), and sources cited therein.

88. See MONEY, LANGUAGE, AND THOUGHT, *supra* note 3, at 156-177 (1982).

89. *Marigold*, 50 U.S. at 567.

90. *Id.*

91. The word “shadow” in antebellum American discourse often adverted to Plato’s *Allegory of the Cave*, a dialogue within THE REPUBLIC on the relationship between reality and perception. PLATO, THE REPUBLIC: BOOK VII, 514-20 (Alexander Kerr trans., Charles H. Kerr and Co. 1911). “Shadow” served in the allegory as well as in antebellum discourse as a metaphor for the unreal and insubstantial. The word bears that meaning in sources cited throughout this article, and ought to be recognized for the specific meaning it carried in the minds of antebellum commentators.

92. *Craig v. Missouri*, 29 U.S. 410, 442-43 (1830) (Johnson, J., dissenting).

93. SELLERS, *supra* note 25, at 45.

94. *Id.* at 45-46 (1991).

95. Act of April 2, 1792, ch. 16, § 10, 1 Stat. 246, 248 (1792) (prescribing coin weights and text); Act of January 18, 1837, ch. 3, § 13, 5 Stat. 136, 138 (1837); Act of March 3, 1849, ch. 110, § 4, 9 Stat. 397 (1849) (prescribing the weight of gold coin).

96. ART & MONEY, *supra* note 81, at 60-87; Ellen, *supra* note 80, at 218.

97. MIHM, *supra* note 16, at 3-4; Natelson, *supra* note 87, at 1036; Charles F. Adams, *Banks and Currency*, 1 HUNT’S MERCHANTS’ MAG. 214, 215 (1839).

therefore a net exporter of bullion.<sup>98</sup> The inevitable consequence of this shortage of bullion was a shortage of coin.<sup>99</sup>

But commerce demanded a medium of exchange. The federal government failed to provide it and the states were prohibited to do so, and so other types of currency were circulated.<sup>100</sup> The sources were numerous and bewildering.<sup>101</sup> Foreign currency circulated,<sup>102</sup> as did a hodgepodge of promissory notes of banks,<sup>103</sup> corporations, and even individuals.<sup>104</sup> Of these, bank notes were by far the most common. As chattels, they began as simple written communications, but over time became elaborate works of art.<sup>105</sup> As texts,<sup>106</sup> bank notes looked forward to the promised payment of value later, rather than backward to the assaying of weight and purity found in the text of a coin.<sup>107</sup> The texts of bank notes spoke not to the known certainties of the past, but to the shadowy promise of the future.

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98. MIHM, *supra* note 16, at 26; *See generally* 15 NILES' WKLY. REG. 220 (1819); ADDRESS OF THE PHILADELPHIA SOCIETY FOR THE PROMOTION OF DOMESTIC INDUSTRY, *reprinted in* 16 NILES' WKLY. REG. 263 (1819); H.R. Rep. of January 26 (1819), *reprinted in* 16 NILES' WKLY. REG. 265 (1819). As a general rule, specie was the only acceptable payment for imports. MURRAY N. ROTHBARD, *THE PANIC OF 1819*, 3 (Ludwig von Mises Inst. 2002).

99. One means by which the amount of specie increased during this period was by private persons bringing foreign currency, bullion, or gold or silver plate to the various United States mints to be stamped into coin. Rep. on Operations of the U.S. Mint (1840) *reprinted in* 2 HUNT'S MERCHANTS' MAG. 382 (1840). The metal was assayed for purity, purified if necessary, and stamped into the requested denominations. Because this service was available to persons holding gold or silver, the text of any coin was easily obliterated and replaced, and therefore less important than its bullion value.

100. *See Banks and Currency*, *supra* note 97, at 215; *Gibbons v. The People*, 33 Ill. 443, 446 (1864).

101. DILLISTIN, *supra* note 69, at 3.

102. For example, in 1842 Congress set the value of the British pound sterling, both for purposes of circulating currency and valuations of imports, at \$4.84. Act of July 27, 1842, ch. 66, § 1, 5 Stat. 496 (1842). For a list of acts setting the value of foreign coin circulating within the United States, *see* Act of April 10, ch. 22(a), 2 Stat. 374 (1806).

103. The notes of banks served well as currency because they did not memorialize an obligation arising from one discrete transaction, as did ordinary promissory notes, and their redemption was not subject to any general statute of limitations. *Tower v. Appleton Bank*, 85 Mass. 387, 389 (1862).

104. *See, e.g.*, *Morton v. Rogers*, 14 Wend. 575 (N.Y. 1835). *See also* *Root v. French*, 13 Wend. 570, 573 (N.Y. Sup. Ct. 1835) (noting that "negotiable paper . . . in commerce answers many of the purposes of money"). *See generally* J.S. GIBBONS, *THE BANKS OF NEW YORK, THEIR DEALERS, THE CLEARING HOUSE, AND THE PANIC OF 1857* (1858) (especially chapter one).

105. ART & MONEY, *supra* note 81, at 60.

106. The idea of reading banknotes and counterfeits as texts did not originate with me. The historian David M. Henkin has suggested the same process. Henkin's principal concern is to include banknotes within the larger phenomenon of the proliferation of print media in urban America during the antebellum period. HENKIN, *supra* note 16, at 137-56.

107. *See* ART & MONEY, *supra* note 81, at 9-10; *see also* DILLISTIN, *supra* note 69, at plates V, VII, IX (1949); *Markle v. Hatfield*, 2 Johns. 455 (N.Y. Sup. Ct. 1807); *Miller v. Race*, (1785) 97 Eng. Rep. 398, 399, 401 (K.B.).

*B. Economic Change and the Idea of the Counterfeit*

The American economy changed over the course of the first half of the Nineteenth Century from one model of exchange to another. The debate over this change was sometimes framed in terms of the intrinsic and the counterfeit. Each term carried an enormous cargo in the discourse of the period. “Intrinsic” captured the longing for a polestar to guide commerce and political economy.<sup>108</sup> It satisfied that longing with the primitive belief that gold and silver had value intrinsic to themselves, independent of domestic production, commercial cycles and political mismanagement.<sup>109</sup> “Counterfeit” captured the fear of the opposite and impressed it upon both the simulacra of authentic circulating currency and the simulacra of value.<sup>110</sup>

Each model of exchange depended upon and enacted a different concept of money. The older model<sup>111</sup> was driven by the exchange of commodities for their use value by means of currency thought to have intrinsic value. Within this model, every legitimate transaction ought to end with each party holding value. As Chief Justice William Tilghman of the Supreme Court of Pennsylvania wrote in 1826: “There is a great difference between an article whose value is intrinsical, and that whose value is not so, but depends on its being the representation of value.”<sup>112</sup> These were the only two categories within traditionalist understanding. Those committed to this model of exchange believed that “[u]pon principles of justice and honesty it would seem that whoever parts with that which is valuable should receive value for it; and he who receives value should give value in return.”<sup>113</sup> They invoked this bromide not as a tautology, but as a statement of morality. Its acolytes simply begged the question of intrinsic value.

The newer model was driven by the exchange of money for money as a means of increasing capital.<sup>114</sup> In such an exchange there could be no true equivalency. It was a precursor of modern finance capitalism and was anathema to the faithful of the old model. Its acolytes denied, not the notion of intrinsic value, but the need for a currency having intrinsic value. Its

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108. Compare JAMES, *supra* note 6, at 234.

109. SELLERS, *supra* note 25, at 45.

110. See *infra* Part IV.A.

111. See generally Clark, *supra* note 17.

112. *Curcier v. Pennock*, 14 Serg. & Rawle 51, 1826 WL 2214, at \*8 (Pa. Mar. 27, 1826).

113. *Corbit v. President, Dirs. & Co. of Bank*, 2 Del. 235, 267 (1837) (Layton, J., dissenting) (quoting *Lightbody v. Ontario Bank*, 11 Wend. 9, 14 (N.Y. Sup. Ct. 1833), *aff'd* *Ontario Bank v. Lightbody*, 13 Wend. 101 (N.Y. 1834)).

114. KARL MARX, CAPITAL: VOLUME ONE 250-57, 267 (Ben Fowkes, trans., Penguin Classics 1990) (1867).

currency was merely a signifier<sup>115</sup> of a promise to pay later. Such currency did not fit into either of Tilghman's categories. It had no intrinsic value and it could not with certainty be said to have been a representation of value within Tilghman's meaning.

The new model depended upon credit and confidence as the basis of exchange and as the basis of currency.<sup>116</sup> According to its advocates, credit was one of "the great agents in nature."<sup>117</sup> "She" had facilitated industrial expansion by "concentrat[ing] the powers of all the producing classes."<sup>118</sup> Rather than begging the question of intrinsic value, the acolytes of the new model simply ignored it.

The transition in models of exchange worked a profound change in the meanings associated with money. At the beginning of the Nineteenth Century, gold and silver formed the foundation of the currency. By the middle of the century, specie was no longer necessary and confidence was the basis of the currency. Commentators as diverse as Daniel Webster and Herman Melville's Confidence Man recognized the new dispensation. Webster stated on the floor of Congress that: "Credit and confidence have been the life of our system, and powerfully productive causes of all our prosperity."<sup>119</sup> Melville's Confidence Man observed in 1857 that: "Confidence is the indispensable basis of all sorts of business transactions. Without it, commerce between man and man, as between country and country, would, like a watch, run down and stop."<sup>120</sup>

Bank notes embodied the new credit economy. They were complex signifiers of many signifieds, not one of which rested firmly on anything widely thought to have intrinsic value. Their texts did not look backward to established certainties, as did the texts of coins. They looked forward to a promised payment, and so simultaneously demanded and tested the confidence of any person who might rely upon them. The attenuated link

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115. This term lies at the heart of Saussurean semiotics. Under his theory every unit of communication is composed of a concept, the *signified*, and its *signifier*, the sounds or symbols that convey the concept. See generally FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 99-103 (Roy Harris trans., Open Court 1986) (1915). The link between these two is arbitrary, and the relationship may be simple or complex. *Id.* As he observed, "visual signals . . . can exploit more than one dimension simultaneously." *Id.* at 70. This appears to be the case with the visual signal that is circulating currency.

116. See Charles Francis Adams, *The Principles of Credit*, 2 HUNT'S MERCHANTS' MAG. 185, 188, 185, 188, 208-10 (1840); *Exch. Bank of Columbus v. Hines*, 3 Ohio St. 1, 20 (1853) ("Money, as such, has no inherent or intrinsic value within itself other than its exchangeable value.").

117. *The Principles of Credit*, *supra* note 116, at 209.

118. *Id.*

119. Daniel Webster, Second Speech on the Sub-Treasury (Mar. 12, 1838), in DANIEL WEBSTER, THE WORKS OF DANIEL WEBSTER 424 (1851).

120. HERMAN MELVILLE, THE CONFIDENCE MAN 111 (Herschel Parker, ed., Norton Critical Ed. 1971).

they purported to represent between value and promise was embraced by some and dismissed by others as at best elusive and at worst illusory.

From the perspective of economics, this transition disrupted longstanding and widely-held ideas of value. It imposed on disciples of the old faith a new dispensation which they rejected with all the fervor of true believers rejecting a heresy.<sup>121</sup> From the perspective of semiotics, the transition sparked sharp and bewildered reactions to the breach of the traditional, though problematic, relationship between the signifier “money” and its signified, value.<sup>122</sup> From the perspective of anthropology, the transition caused a loss of faith in the power of a previously understood fetish – money.<sup>123</sup>

#### IV. THE REAL COUNTERFEITING CRISIS

##### A. *Banking as Counterfeiting*

The real counterfeiting crisis in antebellum America was not the counterfeiting of notes by criminals, but the counterfeiting of value by bankers. The business model of banking is, in essence, the sale of money for more money. This model turned traditional expectations of exchange on their heads, because the exchange of a thing of greater for a thing of lesser intrinsic value was nonsensical to a traditionalist. Banks did not deal in things having use value. They neither bought nor sold goods, except to execute a judgment.<sup>124</sup> In fact, many states prohibited banks from dealing in goods, with that exception.<sup>125</sup> Goods served, not for their use value, but as security for the exchange of money for more money. This baffled one of Niles’ correspondents, who marveled at the manner in which business was conducted under the new dispensation:

the silly merchants . . . buy of each other, the very same article, over and over again . . . Goods were purchased, under the influence of this mania, six, eight, ten times over, without ever being removed from the place where they were originally stored. It was computed

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121. For an example of the religious tone of the debate, see Letter to the Editor, *The Paper System*, 14 NILES’ WKLY. REG. 141, 142 (comparing bankers to the money-changers chased out of the Temple by an indignant Jesus, the author implicitly invoking *Mark* 11:15-17).

122. SAUSSURE, *supra* note 115, at 99–103.

123. Ellen, *supra* note 80, at 226-27.

124. See An Act to incorporate the subscribers to the Bank of the United States, ch. 10, 1 Stat. 191, 196 (1791); 1837 Mich. Pub. Acts 4, §1 (repealing 1836 Mich. Pub. Acts 86, § 2); 1851 Vt. Acts & Resolves 25, § 47.

125. See An Act to incorporate the subscribers to the Bank of the United States, ch. 10, 1 Stat. at 196 (1791).

that these very goods were pledged, in effect, to the banks for accommodations, by their respective purchasers, for at least six times their value!<sup>126</sup>

Karl Marx suggested that banking, or “money exchanged for money . . . is incompatible with the nature of money, and therefore remains inexplicable from the standpoint of the circulation of commodities.”<sup>127</sup> This view was anticipated by the commentator above and by other adherents of the earlier model of exchange. For them, the new model was anomalous but not inexplicable. They condemned it with bell, book, and candle as an unholy compound of usury and fraud.<sup>128</sup>

This crisis of confidence in the nature of money divided antebellum society from top to bottom, with elite leaders on each side. The hard money men continued to insist that money ought to have intrinsic value.<sup>129</sup> If that were so, each party to a sale for money would hold real value after the sale – the seller the money and the buyer the goods. Hard money men recognized only the most limited place for paper money. With the British economist David Ricardo, they believed that there ought to be a perfect, one-to-one relationship between paper issued by banks and the specie on which it was based.<sup>130</sup> They thus reduced the paper medium to something like a warehouse receipt.<sup>131</sup> It was a convenient signifier, a lighter, more easily transportable document of title to a quantity of bulky, weighty specie.<sup>132</sup> In their view, bank notes ought to be little more than warehouse receipts or bills of lading representing a quantity of specie identified to the note and held in a known location. For Ricardo, as well as for his followers, bank notes were not money.

Some leading American judges took the traditionalist position. For example, Hiram Johnson, a Justice on the Supreme Court of the United States, implicitly followed Ricardo. He wished to ensure “[t]hat the real dollar may represent property, and not the shadow of it, . . . otherwise it

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126. 14 NILES' WKLY. REG. 154 (May 2, 1818).

127. MARX, *supra* note 114.

128. See 12 NILES' WKLY. REG. 221 (May 31, 1817); see also 12 NILES' WKLY. REG. 357-59 (Aug. 2, 1817).

129. See Michael O'Malley, *Specie and Species: Race and the Money Question in Nineteenth Century America*, 99 AM. HIST. REV. 369, 373 (1994).

130. Ricardo, *supra* note 82, at 4. See also *Depreciation of Paper Currency*, 17 EDINBURGH REV. 339, 351 (1811) (reviewing the same pamphlet).

131. A “warehouse receipt” is defined as “[a] document evidencing title to goods stored with someone else; esp., a receipt issued by a person engaged in the business of storing goods for a fee. A warehouse receipt, which is considered a document of title, may be a negotiable instrument and is often used for financing with inventory as security.” BLACK'S LAW DICTIONARY (7th ed. 1999).

132. Ricardo, *supra* note 82, at 2, 10.

must be the *subject* of exchange, and not the *medium*.”<sup>133</sup> Senator Myndert Van Schaick, a successful dry goods merchant<sup>134</sup> and a member of the leading commercial court of the antebellum period,<sup>135</sup> wrote that bank notes “circulate like coined metal, so long as their representative character remains unimpaired; but a bank bill is not money, according to the understanding between the parties, any more than it is money, according to the signification of that word.”<sup>136</sup> Later judges would see the matter quite differently.

In fact, the lending practices of antebellum banks defied the traditionalist understanding held by Johnson and Van Schaick. There were two reasons for this. First, it was lawful for banks to lend more than they held in capital.<sup>137</sup> As early as 1790, Alexander Hamilton had insisted:

It is a well-established fact, that banks in good credit can circulate a far greater sum than the actual quantum of their capital in gold or silver. The extent of the possible excess seems indeterminate; though it has been conjecturally stated at the proportions of two and three to one.<sup>138</sup>

For example, the Massachusetts Bank, originally chartered in 1784, was, in 1791, limited in its lending to “double the amount of their capital stock in gold & silver, actually deposited in the Bank[.]”<sup>139</sup> The Bank of New York, chartered by that state’s legislature in 1791, was permitted to lend “three times the sum of the capital stock subscribed, and actually paid into the bank[.]”<sup>140</sup>

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133. *Craig v. Missouri*, 29 U.S. 410, 444 (1830) (Johnson, J., dissenting) (emphasis added).

134. Obituary, *Hon. Myndert Van Schaick*, N.Y. TIMES, Dec. 3, 1865.

135. The New York Court for the Correction of Errors, abolished by constitutional amendment in 1846, was composed of the members of the Senate. See N.Y. CONST. art. VI, § 25 (1846). When issues of equity were before the court the members of the Supreme Court sat as members of the court as well. When issues of law were before the court the Chancellor sat as a member of the court. Senators used the honorific “Senator” although they functioned as judges. See *Thompson v. Thompson*, 21 Barb. 107 (N.Y. Sup. Ct. 1855).

136. *Ontario Bank v. Lightbody*, 13 Wend. 101, 109-11 (N.Y. 1834).

137. See HAMMOND, *supra* note 22, at 134-137.

138. See KROOSS, *supra* note 11.

139. 1790-1791 Mass. Acts. 360-361 reprinted in KROOSS, *supra* note 11, at 323.

140. 1791 N.Y. Laws page no. 360-364, reprinted in KROOSS, *supra* note 11, 332, 335. The charter of the Bank of New York was penned by Hamilton himself. It became the model for most bank charters issued later, and so set the requirements, if not the actual practices of American banks, for decades. HAMMOND, *supra* note 22, at 142. It did not include any provision to enforce the actual payment to the bank of its subscribed capital. See KROOSS, *supra* note 11. The Bank of South Carolina, chartered in 1801, was similarly limited in its issuance of notes. See *State v. The Bank of South Carolina*, 28 S.C.L. (1 Speers) 433 (1843), 1843 WL 2480, at \*9, 10 (S.C. Err. 1843).

One effect of this was to double and triple the effective interest rate the community paid and the bank received on its capital.<sup>141</sup> This practice was the reason for much of the condemnation of banks during this period as “institutions based on fraud and supported by usury[.]”<sup>142</sup> The usury lay not in the rate of interest paid by any individual borrower, but in the rate paid by the community.<sup>143</sup> The fraud lay in the lending of money the bank did not have, by means of notes which, by their nature, could not truly have represented their face value.

Second, some banks offended traditionalists by lending, *ultra vires*, money subscribers had not yet paid into the capital account. Perhaps the most egregious example of this latter practice<sup>144</sup> was the infamous, but lawfully-chartered Farmers’ Exchange Bank of Gloucester, Rhode Island. The historian Herman Krooss described that bank’s early history as follows:

Founded in 1804, the bank’s capital stock consisted of 2,000 shares of fifty dollars each, to be paid in seven installments in gold or silver. . . . The directors, each holding 103 shares, met their first five installments with notes. They made no payment of any kind on the last two installments. . . . The bank commenced with only \$3,081.11 in capital stock. According to the weekly statements, there were several periods when the amount of circulating bills exceeded the amount of notes due: For instance, on March 25, 1805, the face amount of bills in circulation was \$72,211.00, and the debts owed the bank equaled [sic] \$53,275.00, on March 28, 1808, while the bank held only \$380.50 in specie and bills of other banks, \$22,524.00 of their own bills circulated.<sup>145</sup>

Whether bankers unlawfully lent money not yet paid into the capital fund, or lawfully lent three times the money they had, the systemic frauds on which banking was based were thought to be of a piece with the fraud of counterfeiting. Familiar with the counterfeiting of coin, antebellum Americans lacked a vocabulary to describe these practices, and denounced them instead in the language of the counterfeit. As the clergyman and lawyer Theophilus Fisk wrote in 1837:

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141. See 14 NILES’ WKLY. REG. 242 (June 6, 1818); see 14 NILES’ WKLY. REG. 286 (June 20, 1818); see also KROOSS, *supra*, note 11.

142. 12 NILES’ WKLY. REG. 221 (May 31, 1817).

143. One commentator characterized such interest rates as a tax levied upon the community. 14 NILES’ WKLY. REG. 242 (June 6, 1818).

144. *Bank Notes Not Money*, 12 NILES’ WKLY. REG. 220, 221 (1817).

145. KROOSS, *supra* note 11, at 351. The bank failed in February 1809. *Bean v. Smith*, 2 F. Cas. 1143, 1143 (No. 1174) (C.C.D. R.I. 1821).

The laws against counterfeiting the currency have ever been intensely severe – and yet our Banking incorporations counterfeit the constitutional currency of the country, or substitute for real value their worthless irredeemable paper, and it is all very respectable. Let an individual do the like – let a poor laboring man follow their pernicious example, and he is sent to the Penitentiary or State’s Prison.<sup>146</sup>

Counterfeiting was not an imposition on the banking system so much as an epitome of it. As Hezekiah Niles later noted:

A *famous* counterfeiter, named Briggs, has been detected at Boston. He had a large assortment of bills – from twenty to twenty five, of different denominations, on different banks! We do not think it necessary to particularize them. Many *genuine* bills are as much counterfeits as those found in the possession of Briggs. But the makers of the former escape, whilst this little *dealer* is punished!!– SO MUCH FOR A NAME.<sup>147</sup>

Freeman Hunt’s correspondents joined Niles’ correspondents in complaining that a charter was a license to commit fraud:

In this way, by means of legislative charters, bills emitted by banks without capital enjoy almost equal credit with those of solid resources, until something turns up to destroy the public confidence. A dozen men who are not worthy of credit for a single dollar, and who individually could not obtain credit for that amount, by some means become possessed of a charter, and thus collectively obtain unlimited credit. By means of a charter, a number of nothings are manufactured into something.<sup>148</sup>

The outrage felt by the editorial class toward bankers and counterfeiters could barely be contained in the literary, alchemical, sexual, and biblical metaphors in which it burst forth. In a comic essay penned in 1843, Edgar Allan Poe equated swindlers with bankers, calling them “banker[s] *in petto*,” and calling the banking system “a diddle at Brobdingnag” – a

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146. THEOPHILUS FISK, THE BANKING BUBBLE BURST 41 (1837).

147. *Counterfeiters*, 15 NILES’ WKLY. REG. 361, 362 (1819) (emphasis in original).

148. *The Theory of Banking*, 5 MERCHANTS’ MAG. & COM. REV. 27, 33 (1841).

swindle in Swift's land of the giants.<sup>149</sup> One of Niles' contributors chimed in that "[t]heir [banks'] whole policy has been to give a basis of reality to that which had none before."<sup>150</sup>

The poet and editorialist William Leggett, explaining how worthless men might obtain a bank charter, conflated banking with the darkest of all crimes. He damned the system as having been, "conceived in the stews of legislative prostitution, born in corruption, and smell[ing] to heaven with the rank odour of hereditary rottenness. How long will freemen – or men claiming to be free – consent to have this bastard offspring of fraud and folly for their master?"<sup>151</sup> There was little light separating bankers from counterfeiters, those "disciples of Lucifer," whose "tricks"<sup>152</sup> had the power to deceive by appearances.<sup>153</sup> They were snakes and devils, and their work was akin to the deception in the Garden of Eden. They threatened all that was stable, good, and sacred in traditional antebellum culture. Bankers, swindlers, and counterfeiters occupied the same rank in the pandemonium.<sup>154</sup>

## V. STABILITY WITHOUT SPECIE

### A. Stabilizing the Signified: Promise On Paper As Intrinsic Value

Other Americans did not accept that dire equation. They accepted a currency that was neither metallic nor a receipt for a quantity of metal reserved in a vault. They accepted as currency representations of promises in which confidence might safely be placed.<sup>155</sup> To such Americans it was not an abomination that a bank could lend more than it had. It was a means by which the effects of the chronic shortage of specie could be relieved and the energy of the community applied.<sup>156</sup>

In what might be read as an effort to link credit to the notion of intrinsic value, Charles Francis Adams described confidence's doppelganger, credit, as one of "the great agents in nature."<sup>157</sup> If credit could be characterized as

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149. POE, *supra*, note 65, at 388. Brobdignag was the land of the giants visited by Lemuel Gulliver in Jonathan Swift's *Gulliver's Travels* (1726). Poe used the misspelling Brobdignag in the several versions I have seen.

150. *The Paper System – No. IV*, 14 NILES' WKLY. REG. 194, 195 (1818).

151. William Leggett, *Banking*, PLAINDEALER, Aug. 26, 1837, reprinted in DEMOCRATICK EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY BY WILLIAM LEGGETT, at 184-185 (Lawrence H. White ed., Liberty Press 1984).

152. DILLISTIN, *supra* note 69, at 36 (quoting 29 HUNT'S MERCHANTS' MAG. 72-73 (1853)).

153. See DILLISTIN, *supra* note 69, at 36.

154. Here I am invoking Milton's infernal city in *Paradise Lost* as a counterpoint to a pantheon.

155. See *The Principles of Credit*, *supra* note 116, at 209.

156. *Id.*

157. *Id.*

natural, it might more easily be accepted as a substitute for gold. Adams went further. Credit was downright human; it was a powerful and fecund woman.<sup>158</sup> “She” had facilitated industrial expansion and “concentrated the powers of all the producing classes.”<sup>159</sup> “She has stepped in to inspire the navigator with confidence,” Adams gushed, and she has wrought an “almost magical transformation” of Manhattan Island.<sup>160</sup> And while Adams’ extravagant thinking was not less magical than the primitive idea that gold has intrinsic value, its focus was sharply distinct.

Adams recognized that credit was the linchpin of the new economy, and, implicitly, that promises had superseded things conventionally believed to have intrinsic value as the basis of exchange. Despite that, Adams counseled caution. He recognized that some “honest and well-disposed citizens” had lost sight of any connection between credit and value, even to the extent of seeing credit, or promises, as things of intrinsic value in themselves.<sup>161</sup> Such acolytes of the new dispensation seemed almost intoxicated by its possibilities:

There are not a few honest and well-disposed citizens . . . who . . . have almost convinced themselves that there is a substantive existence in credit remaining even when separated from capital, and after promises made cease to be performed or even relied upon. The consequence has been a tendency to disregard the safe proportion which credit should always bear to capital, and entirely to overlook the indispensable necessity of literally performing contracts.<sup>162</sup>

In other words, credit now had intrinsic value in the eyes of these “honest and well-disposed citizens.” Their faith was the future of currency in the United States.<sup>163</sup> They had, as the hard money men accused, made something of nothing.<sup>164</sup> Just as the hard money men worshiped the value they believed intrinsic in gold, their successors worshiped credit as the new

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158. *Id.*

159. *Id.*

160. *The Principles of Credit*, *supra* note 116, at 209.

161. *Id.* at 204-205. A contributor to Hunt’s Merchants’ Magazine warned that “[c]redit may accelerate the formation of capital, but it can never itself be capital,” and likened the excess issuance of bank notes as a form of “gambling speculation.” 1 HUNT’S MERCHANTS’ MAG. 44, 47 (1839).

162. *The Principles of Credit*, *supra* note 116, at 197-98. *See also* Edward Everett, *Accumulation, Property, Capital, and Credit*, 1 HUNT’S MERCHANTS’ MAG. 20, 27 (1839).

163. *The Principles of Credit*, *supra* note 116, at 196.

164. *Id.* at 196-97.

fetish.<sup>165</sup> In the terms of the antebellum debate, currency need only be the signifier of a promise, and not of any intrinsic value.<sup>166</sup> As promise replaced intrinsic value it came to be confused with intrinsic value.<sup>167</sup> Thus, in 1853, the Supreme Court of Ohio held that credit was the same as capital for tax purposes because “[a] valid credit against a responsible person, therefore, is not a mere shadow, but property possessing intrinsic value within itself.”<sup>168</sup>

As promises were mistaken for things of intrinsic value, the notes that memorialized them were also mistaken for things of intrinsic value. They took on the characteristics of fetishes in the antebellum economy, just as specie had before. The curious practice of cutting paper notes in half and circulating the halves as currency is an example. This practice began as a way of sending notes safely through the mail but appears to have expanded to respond to the shortage of money.<sup>169</sup> Henry Bradshaw Fearon, an English traveler and chronicler in the tradition of Alexis de Tocqueville and Harriet Martineau, described a purchase he made with bank notes, after which:

The store-keeper had no silver change; to remedy which, he took a pair of scissors and divided the [one dollar] note between us: I enquired if the half would pass, and being answered in the affirmative, took it without hesitation, knowing the want of specie throughout the country, and being previously familiarized with Spanish dollars cut into every variety of size. I now find that demi-notes are a common circulating medium.<sup>170</sup>

The reference to Spanish dollars invokes the famous “pieces of eight,” divided into “bits” of one-eighth dollar apiece. Just as these, made of gold, circulated in parts, so also, according to Fearon, demi-notes of paper circulated as currency.<sup>171</sup> As early as the second decade of the Nineteenth Century, bank notes were beginning to acquire the status of fetishes to which some market participants attributed intrinsic value.

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165. MONEY, LANGUAGE, AND THOUGHT, *supra* note 3, at 57; *The Principles of Credit*, *supra* note 116, at 208-09.

166. *Supra* Part III.B.

167. *Id.*

168. *Exch. Bank of Columbus v. Hines*, 3 Ohio St. 1, 26 (1853).

169. See *Bullet v. Bank of Pennsylvania*, 4 F. Cas. 647, 648 (C.C.D. Pa. 1808) (No. 2125); *Union Bank v. Warren*, 36 Tenn. (4 Sneed) 167, 168 (1856); *Bank of United States v. Sill*, 5 Conn. 106, 111 (1823).

170. HENRY BRADSHAW FEARON, A NARRATIVE OF A JOURNEY OF FIVE THOUSAND MILES THROUGH THE EASTERN AND WESTERN STATES OF AMERICA 287-88 (Strahn and Spottiswoode, Printers-Street 1819).

171. *Id.* at 288.

Another example of this rising belief was Mr. Justice McLean's assertion that the states had the legal authority to make payment in counterfeit paper good payment in certain circumstances:

The passing of counterfeit money is prohibited under severe penalties, by the laws of every state; and is it not in the power of a state to provide by law, that every obligation given for counterfeit paper, known to be such by both parties, shall be valid. [T]his will scarcely be denied.<sup>172</sup>

Under this view, a thing having the form and appearance of a note could have value attributed to it regardless of its provenance. The courts rejected both arguments, holding that half a note could not be negotiable and that payment in counterfeit currency was not good payment.<sup>173</sup> But the fact that these arguments could be made at all reflects the tendency in the market to reify the note and mistake it for a thing of value in itself. It was as if the floating signifier "money," having come unmoored from its old signified, had docked successfully at a new one.

But regardless of all this, commerce marched on. The market required a circulating medium of exchange. It was a simple matter of fact that, lacking sufficient specie, the market depended upon the circulation of bank notes. Judges on the other side of the debate recognized this practical need and crafted rules to accommodate it. Lord Mansfield had earlier provided a basis for a practical approach when, in 1758, he held that bank notes issued by the Bank of England and, thus, based on its credit, were money.<sup>174</sup>

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172. *Craig v. Missouri*, 29 U.S. 410, 462 (1830) (McLean, J., dissenting). As early as 1807, the courts had contemplated the possibility that counterfeit bank notes might signify value at the option of the parties. Chief Justice Kent noted in the germinal case of *Markle v. Hatfield* that:

[T]here are some ancient *dicta* in the English law, which advance a contrary doctrine [to the doctrine that payment in counterfeit currency was a failure of consideration] . . . . In *Shepherd's Touchstone* (p. 140) it is laid down, and with a reference to the *Terms de Ley*, that if payment be made partly with counterfeit coin, and the party accept it, and put it up, it is a good payment.

*Markle v. Hatfield*, 2 Johns. 455, 457 (N.Y. Sup. Ct. 1807).

173. *Markle*, 2 Johns. at 459. Some American judges believed that demi-notes were negotiable at full face value in England, but rejected this rule as unsound. *Warren*, 36 Tenn. at 170. In *Armat v. Union Bank of Georgetown*, plaintiff had cut a one hundred dollar note in half, and lost one half in the mail. 1 F. Cas. 1129, 1129 (C.C.D. D.C. 1819). He presented the other half to the defendant bank and demanded the whole value. *Id.* The bank asked the court to adopt as law the custom of paying half the face value of a note cut in half. *Id.* The bank had in fact offered plaintiff half value, in accordance with that custom. *Id.* The court, by Chief Judge Cranch, rejected custom and allowed plaintiff to recover full value upon proving ownership and posting a bond to indemnify the bank. *Id.* See also *Farmers Bank v. Reynolds*, 25 Va. (4 Rand) 186, 187 (1826), and *Bank of Virginia v. Ward*, 20 Va. (6 Munf.) 166 (1818).

174. *Miller v. Race*, (1785) 97 Eng. Rep. 398, 402 (K.B.).

“They are as much money, as guineas themselves are,” according to the influential jurist.<sup>175</sup>

Not surprisingly, the Hamilton acolyte and federalist Chief Justice John Marshall followed Mansfield. In *Craig v. Missouri*,<sup>176</sup> he observed with obvious acquiescence that bank notes were “paper intended to circulate through the community for its [the community’s] ordinary purposes, as money.”<sup>177</sup> The Court for the Correction of Errors of New York recognized the practical need as well: “Bills of exchange and promissory notes in some form constitute the medium of exchange, the representative of the property of the country, and in a great measure its currency and, consequently, the basis of general credit and business.”<sup>178</sup> To suggest otherwise would “impair the confidence in these instruments of trade, and cripple their usefulness.”<sup>179</sup> The consequences that would otherwise be suffered by the community were too threatening, and so, problems of counterfeiting aside, the market itself mandated the acceptance of bank notes as currency.<sup>180</sup> Promise became the basis of money.

### *B. Stabilizing the Signifier: Security as Reform*

The first important legislative response to the problems of counterfeit value and counterfeit currency took place in New York.<sup>181</sup> The legislature there had begun considering banking reform in 1825.<sup>182</sup> After earlier half-measures proved ineffective, the legislature reacted to the horrific Panic of 1837 with an elaborate attempt at reform. One year, almost to the day, after that Panic began, the legislature adopted *An Act to Authorize the Business of Banking*.<sup>183</sup> This was commonly referred to as the “free banking” or

175. *Id.* at 398-99, 402.

176. 29 U.S. 410 (1830). The case arose when the Missouri legislature, in 1821, established an office for issuing paper money that would be lent to debt-burdened Missouri farmers. *Id.* at 425. In an opinion rendered by Chief Justice John Marshall, the Supreme Court of the United States ruled that the loan-office certificates were unconstitutional because they were bills of credit emitted by a state in violation of Article I, Section 10 of the Constitution, which forbade the states from emitting “bills of credit.” *See generally id.*

177. *Id.* at 432.

178. *Morton v. Rogers*, 14 Wend. 575, 589 (N.Y. 1835).

179. *Id.*

180. *Id.* at 589-90.

181. *See* 1838 N.Y. Laws 245.

182. The Michigan legislature apparently borrowed one of many New York reform proposals in 1837. 1837 Mich. Pub. Acts 76. That was the first free banking statute in the United States. HAMMOND, *supra* note 22, at 572. It was quickly repealed. Gerald P. Dwyer, Jr., *Wildcat Banking, Banking Panics, and Free Banking in the United States*, 81 ECON. REV. 1, 6, (1996).

183. 1838 N.Y. Laws 245. The law did not affect the operations of existing banks, but only those created under its terms. *Leavitt v. Blatchford*, 17 N.Y. 521, 535 (1858). The Panic began on May 10, 1837, when New York banks suspended payment of their notes in specie. HAMMOND, *supra* note 22, at 464; MARGARET G. MYERS, A FINANCIAL HISTORY OF THE UNITED STATES 98 (Columbia University

“general banking” law in order to distinguish it from the previous practice of issuing legislative charters.<sup>184</sup> Under this act, anyone who satisfied the statutory requirements would be permitted to establish a bank without a charter.<sup>185</sup> The principal regulatory object of this act “was to secure the currency which these institutions [banks] might put in circulation.”<sup>186</sup> Its terms were obviously directed at both the counterfeiting of bank notes and the counterfeiting of value.

The act required every bank created under its auspices to deposit with the state comptroller state or federal bonds of types thought reliable as security for the notes the bank would issue.<sup>187</sup> The act limited the amount each bank could lend according to a formula based upon the face value of the security deposited with the comptroller.<sup>188</sup> Thus, the value of bank notes was derived from the value of bonds issued by others. Promise now secured promise. To this extent, the resemblance of bank notes to modern derivatives cannot be disputed.<sup>189</sup>

Should any bank fail to redeem upon demand, in specie, even one of its notes, the comptroller would be authorized to close the bank permanently. He would sell the bank’s security and use the proceeds to redeem all of the bank’s outstanding notes.<sup>190</sup> In addition to the bond security requirement, each bank was required at all times to hold in specie not less than one-eighth of the face value of its notes then in circulation.<sup>191</sup>

Other states did not embrace New York’s reforms until the 1850s, when many enacted statutes that followed closely the text of New York’s law.<sup>192</sup> Despite Professor Hammond’s inexplicable comments to the contrary, it appears these laws caused banks to adopt more conservative lending practices. They were thought by many contemporaries to have been successful reforms.<sup>193</sup> Economic historians have assembled data showing

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Press 1970). By May 18 of that year, suspension had spread as far south as Charleston, South Carolina. *State v. The Bank of South Carolina*, 28 S.C.L. (1 Speers) 433 (S.C. Err. 1843). Banks in that city suspended specie payments on that date. *Id.*

184. *See generally Leavitt v. Blatchford*, 17 N.Y. 521, 525, 535 (1858).

185. *Leavitt*, 17 N.Y. at 527.

186. *Id.* at 534.

187. 1838 N.Y. Laws 245, § 7.

188. *Id.* § 2.

189. *See THE OXFORD DICTIONARY OF ECONOMICS*, *supra* note 7.

190. 1838 N.Y. Laws 245, § 4.

191. *Id.* § 33.

192. *See* 1850 Ala. Laws 104, 1851 Mass. Acts 757, 1851 Vt. Acts & Resolves 13, 1860 Pa. Laws 459, 1851 Ill. Laws 163, 1858 Iowa Acts 215, 1852 Ind. Acts 152.

193. *See* HAMMOND, *supra*, note 22, at 572, 595-98; Howard Bodenhorn & Michael Hauptert, *Was There a Note Issue Conundrum in the Free Banking Era?*, 27 J. OF MONEY, CREDIT, & BANKING 702, 703 (1995) (noting that banks operating under free banking statutes adopted conservative lending prac-

that very few New York free banks failed after the amendments of the early 1840s.<sup>194</sup>

Free banking did not cure all of the ills of American banking and the American economy. It was not adopted everywhere and did not govern every bank in the states in which it was adopted.<sup>195</sup> As a result of its limited reach, free banking could not prevent the sharp economic downturn of 1857.<sup>196</sup> Even so, it appears that the regulations associated with free banking increased the stability of the banking system, reduced the number of bank failures, and thereby reduced the circulation of notes of failed banks. To that extent, such laws appear to have succeeded in improving the security of the currency, as the legislatures intended.<sup>197</sup>

One might characterize these reforms as efforts to realign signifier and signified, but in a new way. Bank notes issued under these laws were no longer mere receipts for intrinsic value held in a vault. They had become derivatives, the value of which was derived chiefly from other promises deemed reliable. Promises based upon promises, they were increasingly treated as if they had value intrinsic to themselves.

### *C. Stabilizing the Signifier: Aesthetics as Reform*

When the circulating media were composed of traditional money-stuff, such as gold, silver, shells, and beads, security was unnecessary and the link between aesthetics and authenticity largely maintained itself.<sup>198</sup> But with respect to bank notes further assurances of value and authenticity were required.<sup>199</sup> The elaborate border designs and carefully drawn vignettes on bank notes, initially intended to assure authenticity by thwarting counterfeiters,<sup>200</sup> later served as the link between aesthetics and value.

Two factors confounded the reliability of the aesthetic link before the 1850s. The first was the sheer number of different types of notes in circulation.<sup>201</sup> These numbers effectively stripped many users of the ability to discern the authentic by means of the aesthetic.<sup>202</sup> The high quality of

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tices); see Letter to the Editor, *Free Banking*, N.Y. TIMES, Dec. 23, 1852, at 3; Editorial, *Abuse of the Banking Laws*, N.Y. TIMES, Feb. 21, 1854, at 4.

194. See e.g., Arthur J. Rolnick & Warren E. Weber, *Inherent Instability in Banking: The Free Banking Experience*, 5 CATO J. 877 (1986).

195. *Leavitt v. Blatchford*, 17 N.Y. 521, 535 (1858).

196. See MYERS, *supra* note 183, at 126-28.

197. *Leavitt*, 17 N.Y. at 535.

198. DILLISTIN, *supra* note 69; ORMSBY, *supra* note 26.

199. *Id.*

200. *Id.*; 1838 N.Y. Laws 245, § 1.

201. See ORMSBY, *supra* note 26, at 66.

202. *Id.*

many of the counterfeits had the same effect.<sup>203</sup> As early as 1818, *Niles' Weekly Register* noted with alarm that “[t]he engraving” of a particular batch of counterfeits “cannot well be excelled . . . . Some of the [counterfeit] bills are so well executed, that it would puzzle even those most conversant with bank paper, to detect them.”<sup>204</sup> Aesthetics, without more, both confound and invite counterfeiting. As one anthropologist has observed:

Aesthetic appreciation of surface detail can be perceived as proving the genuine – but such “beauty” can be equally understood as misleading. The very regularities that mark genuine value are precisely the hooks upon which forgeries anchor verisimilitude. Both authentic bills and “very good counterfeits” are marked by barely visible detail, detail made a fetish as intricately lovely.<sup>205</sup>

There were two obvious paths to aesthetic reform. One was to reduce the number of designs of circulating notes. People would be more familiar with the remaining designs and would therefore be less likely to be fooled by imitations. This was the path implied in the scheme of free banking.<sup>206</sup> The other was to strengthen the connection between beauty and authenticity by enhancing the aesthetics themselves. The most beautiful artwork would signify value, and lesser quality artwork would betray the counterfeit. Only the most talented artists would be permitted to produce the plates from which bank notes were pressed.<sup>207</sup>

The latter was the plan advocated by the engraver and reformer W.L. Ormsby. In 1852, just when free banking began to spread outside New York, he published a book, elaborately entitled *A Description of the Present System of Bank Note Engraving, Showing Its Tendency to Facilitate Counterfeiting: to Which is Added a New Method of Constructing Bank Notes to Prevent Forgery*.<sup>208</sup> There was no small element of self-promotion in Ormsby’s proposal. Even so, its terms implied a radical return to the earliest equation of beauty and value.<sup>209</sup>

Ormsby equated beauty with truth, beauty with value, and artistic talent with personal integrity. Those equations lay at the heart of his proposed

203. *Id.*

204. 14 NILES’ WKLY. REG.429, Aug. 22, 1818.

205. Alaina Lemon, “Your Eyes Are Green Like Dollars”: Counterfeit Cash, National Substance, and Currency Apartheid in 1990s Russia, 13 CULTURAL ANTHROPOLOGY 22, 31 (1998).

206. See 1851 Mass. Acts 757, § 6; 1860 Pa. Laws 459, §7; 1851 Ill. Laws 163, § 1; 1850 N.J. Laws 140, § 1; 1852 Ind. Acts 152, § 1.

207. See ORMSBY, *supra* note 26.

208. *Id.*

209. See generally *id.*

reform. “A remarkable degree of integrity, therefore, must be awarded to our Artists, as a class.”<sup>210</sup> Ormsby denied that artists had participated in counterfeiting and posited them as “watchful guardians of the public good, as well as of their own honor.”<sup>211</sup> He proposed to “let them be elevated to a dignified position as men; and let the only distinguishing quality be *their relative merit as Artists*.”<sup>212</sup>

Ormsby recommended that the patchwork system be replaced with a system under which each plate would be made entirely by one artist.<sup>213</sup> Each plate would then be copyrighted by the artist and licensed to one bank. This would, in his view, strip the plate of value at auction in the event the bank should fail.<sup>214</sup> He suggested opening the business of bank note engraving to all artists, the best of whom would presumably rise to the top of their profession.<sup>215</sup> This would in turn lead to a very high aesthetic quality of bank note design, making counterfeiting more difficult and more easily detectable.<sup>216</sup> Artists would ally with nature as the sources of the beautiful stuff of money.<sup>217</sup> The best art would now take its place with gold, silver, shells, beads, and other objects and substances rare and beautiful.

Aesthetic quality would finally guarantee authenticity, but only if artists maintained their integrity. “If Artists turn Counterfeiters, there is no protection in any work of art.”<sup>218</sup> Beauty and truth would coincide in the person of the superior artist. With the most talented artists working for the banks, the less talented artists would rarely succeed in producing passable counterfeits.<sup>219</sup> To adopt this method would “remove, from among the lower orders of society,” who, Ormsby implied, lacked merit as artists, “a monstrous temptation to crime.”<sup>220</sup> Beauty and truth could not coincide in the persons of inferior artists, or “among the lower orders of society.” Money would also be money, Ormsby seemed to imply, *because* it would be created by the best people.<sup>221</sup>

Another slightly later commentator articulated the dark side of Ormsby’s argument when he invoked a biblical metaphor, comparing the dishonest engraver to the lesser angels of perdition. He condemned “these

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210. *Id.* at 76.

211. *Id.*

212. ORMSBY, *supra* note 26, at 76.

213. *Id.* at 80.

214. *Id.* at 81.

215. *Id.* at 80-81.

216. *Id.* at 79-83.

217. *Id.*

218. ORMSBY, *supra* note 26, at 86.

219. *Id.*

220. *Id.*

221. *Id.* at 79-83.

disciples of Lucifer,” whose “tricks” had the power to deceive by appearances.<sup>222</sup> The hint at the deception in the Garden of Eden is obvious. And, as in the myth of Eden, those of inferior discernment were most vulnerable. Counterfeits that would not have misled the wise were sufficient to “fleec[e] many an honest laborer or tradesman.”<sup>223</sup>

It is significant that Ormsby directed his proposal not to legislatures but to bankers. He dedicated his book: “To the Presidents and Directors of The Banking Institutions of the United States, this Work, Aiming to set forth the greatest perils to which their Circulation is exposed, and to furnish a Remedy, uniting Artistic Beauty, Economy, and Security against Counterfeiting.”<sup>224</sup> In doing so, he implicitly equated the skill of the artist as creator of beauty with the integrity of the banker who would seek out the services of the artist. This suggests that the conflating of banking with counterfeiting was reaching its end.<sup>225</sup> Perhaps the death knell of that infernal equation was sounded by the abolitionist and reformer Elizar Wright in a letter to the Massachusetts legislature. While still overstating the extent of counterfeiting, Wright characterized it, not as “an American way to wealth,”<sup>226</sup> but as an image of the banking system “reflected from the mirror of the depraved classes.”<sup>227</sup> Currency might still be counterfeited, but banking was no longer counterfeiting.

The free banking legislatures apparently felt no need to embrace Ormsby’s reforms. Instead, they required a state official to design and issue standard form notes for use by all of the free banks within that state. These notes were to be “engraved and printed in the best manner to guard against counterfeiting.”<sup>228</sup> Aesthetics were standardized, rather than exalted, in the legislative effort to ensure authenticity.<sup>229</sup> Further evolution of state law reform was cut short by federal legislation creating greenback currency and

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222. DILLISTIN, *supra* note 69, at 34 (quoting *Bank Note Counterfeits and Alterations: Their Remedy*, 29 HUNT’S MERCHANTS’ MAG. 72, 73 (1853)); *Id.* at 16-17 (quoting THE DESCRIPTIVE REGISTER OF GENUINE NOTES 7 (Gwynee & Day 1859)).

223. *Id.* at 34 (quoting *Bank Note Counterfeits and Alterations: Their Remedy*, 29 HUNT’S MERCHANTS’ MAG. 72, 73 (1853)). See LAWRENCE LEVINE, *HIGHBROW/LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* (Harvard University Press 1988) (discussing the separation of “high brow” from “low brow” culture with respect to other aspects of aesthetic experience).

224. *Id.* at iii.

225. *Id.* at 79-83.

226. GLASER, *supra* note 16.

227. *Id.*; DILLISTIN, *supra* note 69, at 53 (quoting, ELIZAR WRIGHT, *SMALL BILLS: AN APPEAL TO THE LEGISLATURE FOR AN OUNCE OF PREVENTION* 7 (J.S. Potter & Co. 1855)).

228. 1838 N.Y. Laws 245, § 1. A later amendment to the law required the state Banking Department to keep custody of the plates used to print each bank’s notes. *Bank Note Counterfeiting*, N.Y. Times, Jan. 21, 1856, at 1. See also 1851 Mass. Acts 757, § 6; 1860 Pa. Laws 459, §7; 1851 Ill. Laws 163, § 1; 1850 N.J. Laws 140, § 1; 1852 Ind. Acts 152, § 1.

229. ART & MONEY, *supra* note 81, at 73.

taxing notes issued by private banks.<sup>230</sup> The era of private issuance of currency was coming to a close.

## VI. CONCLUSION

As anthropologists have recognized, the systems by which people exchange goods and services, the ideas of value associated with them, and the concept of money enacted by each such system are fundamental aspects of experience.<sup>231</sup> Changes in such fundamentals are difficult processes fraught with conflict. Such a change came to the United States during the early republican and antebellum periods. Traditional notions of intrinsic value, based in gold and silver, lost their dominance in the marketplace and in the law. They were replaced with notions of value based on confidence and credit. As a consequence, the principal medium of exchange also lost its basis in gold and silver. Thereafter, money both reflected and depended upon confidence in promises expressed and implied in its own text.

This transition seemed to many contemporaries to be deeply subversive of the foundations of their culture, and they reacted accordingly. They expressed their hysteria in part by adopting the familiar rhetoric of counterfeiting. Counterfeiting of currency, as the type of counterfeiting easiest to understand and the most obviously fraudulent, became the rhetorical center of traditionalist objection to the new dispensation. Despite the likelihood that it caused little real loss, it became the epitome in the public mind of the larger problem of the counterfeiting of value.

The beginning of the solution to both types of counterfeiting came in the form of the free banking acts, adopted first in New York in 1838 and in other states in the 1850s. Under these acts, reform came in two forms – economic and aesthetic. First, banks were only permitted to issue notes secured by promises deemed sufficiently reliable. Only the most reliable promises could answer the purpose, but specie was no longer required as security.<sup>232</sup> The second prong of reform hearkened back to the origins of money in aesthetics. Bank notes were required under the acts to be issued in standard form, effectively restoring the traditional link between aesthetics and authenticity underlying the very first money.<sup>233</sup> These reforms diminished, but did not eliminate concerns about both the counterfeiting of currency and the counterfeiting of value.<sup>234</sup> Even so, under their influence,

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230. Act of Feb. 25, 1862, ch. 33, 12 Stat. 345 (1862); Act of March 26, 1867, ch. 8, 15 Stat. 6 (1867).

231. Codere, *supra* note 75, at 561.

232. *Supra* Part V.B.

233. *Supra* Part V.C.

234. *Supra* Part V.

antebellum Americans became increasingly confident in confidence as the basis of money.

The increase in public comfort with the paper money issued by free banks had the unintended but salutary consequence of paving the way for the paper greenbacks issued by the federal government to finance the Civil War. Those notes, approved in 1862 and first issued in 1863, were quickly accepted in banking circles.<sup>235</sup> They became the standard of value, at least in some circles, so much so that the *New York Times* could use the phrase “good as greenbacks” in a manner evocative of the more traditional “good as gold.”<sup>236</sup> It was not there yet, but paper money was well on its way to replacing gold, and well on its way to becoming, in itself, a fetish thought to have intrinsic value. From the standpoint of the traditionalists, value had finally and irrevocably been counterfeited, and something could now, indeed, be made from nothing.

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235. See Act of Feb. 25, 1862, ch. 33, 12 Stat. 345 (1862).

236. *Monetary Affairs*, N.Y. TIMES, Apr. 21, 1864, at 3. This is not to suggest that there was no resistance to the greenbacks. See ART & MONEY, *supra* note 81, at 72-79.