

**University of Louisville**

---

**From the Selected Works of Kurt X. Metzmeier**

---

December 1, 2018

# The War(s) on Christmas in the Law Books

Kurt X. Metzmeier



Available at: [https://works.bepress.com/kurt\\_metzmeier/29/](https://works.bepress.com/kurt_metzmeier/29/)

# The War(s) on Christmas in the Law Books

Kurt X. Metzmeier

For several years now, some commentators have decried a “war on Christmas.” Often this war is evidenced by corporations or political leaders using “Happy Holidays” instead of “Merry Christmas,” although its impact can be as serious as the design of Starbucks’ holiday cups. Where these political pundits see this as a dangerous turn toward secularism, others see companies merely acknowledging that other religious holidays are celebrated during the many weeks between Halloween and December 25—weeks devoted to the seasonal retail sales that make up a sizable portion of annual consumer spending by Americans.

Of course, some of the ire from these critics derives from two aging U.S. Supreme Court cases, *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), which ruled that Christmas symbols (a creche or a Christmas tree) couldn’t be erected on public property, unless the government’s implied endorsement of a religion was mitigated by the display being grouped with symbols of other religions like a Hanukkah menorah.

The unstated assumption of these humbug-bears is that until the forces of modernity, secularism and political correctness began their assault in the late 1960s, Christmas had been celebrated uniformly with Christmas trees, Santa Claus, and elaborate church services since the founding of America. None of this was true. All these things—including the worship services—would have been foreign to early Americans.

## A Kentucky Christmas, 1823

This was brought home to me a few years ago while I was researching a book on antebellum Kentucky legal history. While looking up legislative divorce cases from the 1820s—when the only way to get divorced in Kentucky was by an act of the state legislature—I saw a reference to a Senate session held on December 25, 1823. Turning to that page in the Senate Journal, I discovered that the body had convened on Christmas Day and worked a full day where—in stark violation of the spirit of holiday-themed Hallmark Channel rom-coms—they voted to grant a divorce to “Emily Nixon and others.” (1923 Ky. Senate Journal, p. 237). Bah humbug, indeed.

[See illustration, *Senate Journal*, December 25, 1823]

Later, I checked the Kentucky Acts and determined that the first time that the legislature formally adjourned for Christmas was 1861, although the journals suggest the legislators began to informally avoid business on December 25 by the mid-1830s. (Until the current 1891 constitution, the legislature convened on the first Monday of November and continued well into the next year, which meant the issue came up regularly). Of course, the General Assembly being what it is, a dispute soon arose whether legislators could draw a per diem for Christmas and be paid expenses for travel home and back. (They got the per diem; but had to ride home on their own dime). (1865 Ky. Acts, p. 80).

## Legal History of Christmas

The truth is that the 1823 Kentucky Senate Journal reveals more about the history of Christmas in America than any FOX News commentary. The first “war on Christmas” travelled to America with the Pilgrims, reflecting England’s fraught relationship with the holiday since Henry VIII broke with the Roman Catholic Church. Militant Protestants like the Puritans who settled New England saw Christmas as a pagan/papist amalgam with no Biblical justification. They refused to celebrate it or acknowledge it in worship services.

In the 1660 Colonial Laws of Massachusetts, a law for “preventing disorders arising in several places within this jurisdiction; by reason of some still observing such festivals, as were superstitiously kept in other Countries, to the great dishonour of God,” ordered that “whosoever shall be found observing any such day, as Christmas or the like, either by forbearing labour, feasting, or any other way upon any such account at aforesaid, every such person so offending, shall pay for every such Offence Five Shillings, as a fine to the County.”

Uraerea, I nat Mr. Carneal inform the House of Representatives thereof.  
And then the Senate adjourned.

THURSDAY, DECEMBER 25, 1823.

The Senate assembled.  
Mr. Flournoy presented the petition of sundry citizens of Fayette county, remonstrating against the passage of a law establishing election precincts in said county; which was read and referred to the committee of propositions and grievances.  
Mr. Smith, from the committee of religion, made the following report, to wit:  
The committee of religion have, according to order, had under consideration a bill from the House of Representatives, entitled “an act for the divorce of Emily Nixon and others,” and have come to the following resolution thereupon, to wit:  
*Resolved*, That the said bill ought to pass.  
Which was concurred in.  
Mr. Towles moved to lay the bill on the table until the first day of June next; and the question being taken thereon, it was resolved in the negative—Yeas 16, nays 18.  
The yeas and nays being required thereon by Messrs. Beauchamp and White, were as follows, to wit:  
Those who voted in the affirmative, are, Mr. Speaker, Messrs. Barbee, Barrett, Beauchamp, Denny, Faulkner, Flournoy, Hickman, Marshall, Mayo, Morehead, Roper, Towles, J. Ward, Wickliff and Williams.

The Anglicans who settled in cities and in the Southern colonies—including Virginia, the mother state of Kentucky—were more moderate. The Church of England did not see Christmas as a particularly religious day, but they didn’t mind an excuse for a convivial dinner, so long as the first toast was to the health of the king. In Virginia, Christmas was a day where the elites met for a turkey repast and perhaps a few bottles of John Marshall’s favorite drink, Spanish Madeira wine.

The working people also had their fun, drinking and engaging in game-playing and other activities. George Webb, in his 1736 guide for Virginia judicial officers, *The Office and Authority of a Justice of Peace*, listed the games (“bear-baiting, bull-baiting, bowling, cards, cock-fighting, coits [ring-toss], dice, foot-ball, nine-pins, tennis”) that working people (“apprentices, artificers, fishermen, husbandmen, labourers, mariners, servants of all kinds, Waterman”) were prohibited from playing “except at Christmas in their own Houses.”

Webb’s guide also hints at a darker side of Christmas in Virginia and Kentucky. Under the heading *Militia*, he notes that the “commanding officer of the Militia may order Parties to Patrol in his County, at Christmas ... to disperse unlawful Meetings of Slaves, and prevent their Combinations.” The revelry allowed to white servants—which on occasion led to drunken disturbances, or “apprentices riots”—could not be allowed to extend to African slaves whose “combination” was a continuing threat to the slavocracy.

Christmas was also a traditional date for the end of the annual lease agreement for slaves, which is apparent in several contract disputes in the early volumes of the *Kentucky Reports*. The date also was used in employment contracts for free and white servants.

## Christmas and Commerce

Commerce, not religion, would ultimately establish Christmas in American culture, although by the 1840s the gentler Anglican view of the holiday would win over the nation’s churches. Around the same time, American businesses began to sense an opportunity and began to market gifts for the holiday, especially books and manufactured toys for children. Roman Catholic immigrants would bring their fondness for holiday cheer and they embraced the gifting culture. The Germans also brought their Christmas tree, which would become an enduring symbol of the holiday.

Cartoonist Thomas Nast accelerated the new spirit with his 1861 illustration of a gift-laden Santa Claus for a reprint of Clement Moore’s “Night Before Christmas” poem. Previously confined to regions around New York, this Dutch-derived character “went viral” through America, propelled by publications running ads for holiday-gifts.

An 1868 Kentucky statute reflects this new feeling, establishing “the twenty-fifth day of December called Christmas,” along with New Year’s Day and “any day appointed or recommended by the Governor of this State as a day of fast or thanksgiving” as one of 19th century Kentucky’s few public holidays. (The law’s main purpose was to toll the deadlines for “presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes” on these holidays).

Christmas, as we know it, was in full-effect as the Victorian era closed out the 19th and opened the 20th century.

## Legal Research Notes

The statutes cited in this article can be accessed via Hein Online’s State Session Laws Library, which is available to walk-in patrons of the UofL Law Library. The Senate (and House) Journals of the Kentucky legislature are part of our excellent print collection which has items back to the 1820s. George Webb’s *The Office and Authority of a Justice of Peace* can be found in HeinOnline’s Legal Classics library.

The best history of Christmas in America is Stephen Nissenbaum, *The Battle for Christmas* (New York: Vintage Books, 1996), available at UofL’s Ekstrom Library and the Louisville Free Public Library.

## Christmas, 2018

Christmas appears to be doing fine this century, despite the best efforts of the ACLU and U.S. Supreme Court. As I write, it is just after Halloween and the Noel items are positioned to flood the shelves. Indeed, Thanksgiving seems more embattled, remaining only as a midpoint snack in the two months of retail sales that endears the season to Wall Street.

So, on behalf of myself and the 1867-68 Kentucky legislature: Happy Holidays and a Merry “twenty-fifth day of December called Christmas” to all!

Kurt X. Metzmeier is the associate director of the law library and professor of legal bibliography at the University of Louisville Brandeis School of Law. He is the author of *Writing the Legal Record: Law Reporters in Nineteenth-Century Kentucky*, a group biography of Kentucky’s earliest law reporters, who were leading members of antebellum Kentucky’s legal and political worlds. ■

