The State ex rel. Attorney General v. Cunningham
81 Wis. 440 (1892)
and
The State ex rel. Lamb v. Cunningham
83 Wis. 90 (1892)

From the time Wisconsin gained statehood, there have been various power struggles among the three branches of government. These cases involved a dispute between the Wisconsin Supreme Court and the Legislature. The Supreme Court held that an act to apportion and district the members of the state Senate and Assembly was unconstitutional. The first decision was unanimous and Justice Harlow S. Orton wrote the opinion. In the second case, a split court reaffirmed the principles set forth in first decision. Justice John B. Cassoday wrote the majority opinion. Justice John B. Winslow dissented.

In these cases, the court outlawed "gerrymandering," which is creating legislative districts to preserve partisan political advantage.

Article IV of the Wisconsin Constitution provides that every ten years the Legislature shall "apportion and district anew" the members of the Senate and Assembly, according to the number of inhabitants in each district. Assembly districts are to be bounded by county, precinct, town or ward lines, to consist of contiguous territory (that is, a block of land rather than islands here and there) and be as compact as practicable. Senators are to be elected by single districts of convenient, contiguous territory. No Assembly district may follow the same exact lines as a Senate district.

In the first case, the attorney general appeared on behalf of the state to ask the Court to stop the secretary of state from giving the notices of the election for members of the Senate and Assembly under the new apportionment act. The attorney general argued that the apportionment act violated the constitutional provisions discussed above because:

- districts were not drawn according to the number of inhabitants;
- many Assembly districts were not bounded by county, precinct, town or ward lines;
- many districts were not as compact as practicable and
- some Senate districts did not consist of convenient contiguous territories.

The lawyer representing the secretary of state argued that the attorney general had no authority to challenge the law and that only a person who has suffered an actual injury to himself, his property or rights may make such a challenge. The attorney general argued that the question involved was one of public right in which all the citizens of the state were concerned and that the person bringing the suit need not have any individual interest.

The Supreme Court concluded that since the issues raised were of concern to the general public, the attorney general was right to bring the case. The Court then found the act unconstitutional.

After the first decision, the Legislature reconvened and passed another apportionment law. This time, a private citizen asked the Supreme Court to stop the secretary of state from giving notice of the election.

The majority of the court held that the private citizen also had a right to bring the action and that the apportionment law was again unconstitutional. While the first law had formed Assembly districts that crossed county lines, the second law created districts with a significant disparity in population. The majority explained:

> The requirement that assembly districts must be as nearly equal in population as the other constitutional provisions will permit is just as applicable to two or more assembly districts in a single county as to an assembly district composed of two or more counties. While the act here in question in the main conforms to those requirements of the constitution which *prevent equality of representation,* yet it almost wholly disregarded the only constitutional requirement particularly *designed to secure such equality as near as practicable.* (emphasis added)

Justice Winslow dissented, saying he would conclude that the private party who brought the suit had no right to sue because he had suffered no wrong as a result of the law. He also said he did not believe the disparity in population between the districts was significant enough to render the act unconstitutional. Winslow said he feared the Court was entering into a period in which the Legislature would keep enacting laws and the Court would keep striking them down. He wrote: "By the time this process has been repeated several times more, it will be a serious question whether the law finally resulting is the offspring of the legislature or of the court…. Has not the court in fact made the law, and thus invaded the province of its co-ordinate branch of the government?"