

 [Click to Print](#) or Select '**Print**' in your browser menu to print this document.

Page printed from: [National Law Journal](#)

---

News/Columns

## Lessig's Op-Ed on Electoral College Prompts Flurry of Debate

Karen Sloan, The National Law Journal

November 28, 2016

Harvard Law professor Lawrence Lessig sparked a national debate with a Nov. 24 [Washington Post op-ed](#) arguing that members of the electoral college should choose as president popular vote winner Hillary Clinton over Donald Trump on the grounds that everyone's vote should count equally.

A number of his colleagues within the legal academy have now weighed in with their own opinion pieces and blog posts, and most warn that such a move by the electors would be unfair and damaging—or at least contrary to the intentions of the Founding Fathers.

"This seems to go against rule of law ideas that we all abide by the rules for an election set in advance," wrote Rick Hasen, a professor at the University of California, Irvine School of Law on [his Election Law Blog](#). "Turning the electors into mighty platonic guardians doesn't seem to be the right way to go."

Lessig wrote that the framers of the Constitution intended the electoral college to function as a "safety valve on the people's choice," much as a judge who reviews a jury verdict. They were not meant to be a rubber stamp, but to apply reason and judgment to their selection, Lessig argued, citing the writings of Alexander Hamilton. The Constitution does not compel electors to cast their votes any particular way, wrote Lessig, who mounted a short-lived bid for the Democratic presidential nomination on a platform of campaign finance reform.

Only twice before has the electoral college selected a president who didn't win the popular vote, in 1888 and 2000, Lessig wrote. "In both cases, the result violated what has become one of the most important principles governing our democracy — one person, one vote," his op-ed reads. "In both cases, the votes of some weighed much more heavily than the votes of others."

But in a [response published in The Atlantic](#), University of Baltimore School of Law professor Garrett Epps countered that Lessig's presentation of the original purpose of the electoral college is historically "more or less backward."

"In short, nobody in 1787-88 thought of the electors as anything but what they are today — faceless hacks whose ideas and judgment are neither wanted nor permitted," Epps wrote, noting that electors meet and vote in their respective state capitals and don't gather nationally to deliberate. "I've been present when electoral candidates were selected; the main criteria were party loyalty and patronage. Wisdom is seldom sought after, and would be pretty much useless."

Hasen agreed. "First, the electors in the electoral college are not chosen to exercise judgment but to translate the will of the people in each state," he wrote. "If we had a system where we expected them to exercise independent judgment we would spend time vetting them. Instead, they are generally loyal party members."

Orin Kerr, a professor at George Washington University Law School, took to the [Washington Post op-ed pages](#)

[a day later to counter](#) Lessig's call to the electoral college to place Clinton in the White House. The way the Founding Fathers designed the electoral college—namely that the number of electors is based on the sum of each state's U.S. senators and representatives—contradicts Lessig's argument that each vote should count equally. That structure proportionately allocates more electors to states with smaller populations, Kerr wrote.

Moreover, if electors were in fact meant to exercise their own independent judgment, using Clinton's popular vote win as the justification for a vote switch makes little sense, Kerr continued.

"It's true, at least as I understand it, that the original design of the electoral college was for electors to exercise their independent judgment about who would be the best president," Kerr wrote. "But if that's right, it's hard to see how electors would be exercising their independent judgment by deferring to the popular vote."

But come Dec. 19 electors should ask themselves why the popular vote should not prevail when the majority of voters selected "the most qualified candidate for president in more than a generation," Lessig wrote.

"Like her or not, no elector could have a good-faith reason to vote against her because of her qualifications," he continued. "Choosing her is thus plainly within the bounds of a reasonable judgment by the people."

*Contact Karen Sloan at [ksloan@alm.com](mailto:ksloan@alm.com). On Twitter: [@KarenSloanNLJ](https://twitter.com/KarenSloanNLJ)*

---

Copyright 2016. ALM Media Properties, LLC. All rights reserved.