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Election Obstruction

Abstract

In 2020 and 2022, multiple Republican county canvassers refused to perform their ministerial duty to approve election returns, obstructing the official certification of the results. The canvassers latched onto false claims of fraud and other conspiracies advanced by election deniers. They eventually relented because of court orders and public pressure. The elections produced official winners, and crisis was averted. But, as long as election denialism rots our political discourse, election obstruction by canvassers will be a persistent risk with significant dangers for our democracy. This Essay provides a brief history of election obstruction by canvassers, examines the modern link between election denialism and election obstruction, and proposes two solutions to minimize the risk of election obstruction—diversifying canvassing institutions and bypassing county canvassers for national and statewide races

Keywords

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In 2020 and 2022, multiple Republican county canvassers refused to perform their ministerial duty to approve election returns, obstructing the official certification of the results. The canvassers latched onto false claims of fraud and other conspiracies advanced by election deniers. They eventually relented because of court orders and public pressure. The elections produced official winners, and crisis was averted. But, as long as election denialism rots our political discourse, election obstruction by canvassers will be a persistent risk with significant dangers for our democracy. This Essay provides a brief history of election obstruction by canvassers, examines the modern link between election denialism and election obstruction, and proposes two solutions to minimize the risk of election obstruction—diversifying canvassing institutions and bypassing county canvassers for national and statewide races.

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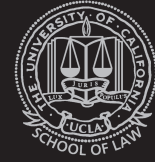


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INTRODUCTION

The main job of a county canvassing board is to verify and tally precinct-level election returns and approve the results.¹ In normal times, it is a mundane, overlooked part of our democratic process that takes place after the media has projected a winner and public attention has shifted away from political races.² In recent years, a worrying trend has developed—when county canvassers muck up the process by declining to approve election results.

For example, in Detroit, Michigan in 2020, the Wayne County Board of Canvassers initially deadlocked when, as part of a larger scheme to question the legitimacy of Joe Biden’s victory over Donald Trump, the board’s two Republican members refused to certify the final county results. The two canvassing board members eventually caved to public pressure and voted to approve the results.³ In 2022 Otero County, New Mexico, the Republican-led canvassing commission refused to approve the final county results in a primary election because of a conspiratorial distrust of voting machines.⁴ New Mexico’s state high court had to step in and order the commissioners to perform their ministerial functions.⁵ In Arizona’s rural Cochise County, a similar scene played out in the general election in 2022. Canvassing officials, in concert with losing Republican candidates, refused to approve the county results.⁶ Again, an Arizona district court had to step in and order the canvassers to do their jobs.⁷

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1. See, e.g., Alexandra Amado, *Election Law Manual*, NCSC ELECTION LAW PROGRAM (2022), https://www.electionlawprogram.org/__data/assets/pdf_file/0025/83833/ELM_Fall_22.pdf 175–78 [https://perma.cc/U7QG-SEDD] [hereinafter *Election Law Manual*].
 2. See, e.g., NAT’L CONF. OF STATE LEGS., *Canvass, Certification and Contested Election Deadlines and Voter Intent Laws* (Oct. 26, 2022), <https://www.ncsl.org/elections-and-campaigns/canvass-certification-and-contested-election-deadlines-and-voter-intent-laws> [https://perma.cc/9763-MDQ4].
 3. See Maggie Astor, *When Michigan Republicans Refused to Certify Votes, It Wasn’t Normal*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/us/politics/michigan-election-results.html> [https://perma.cc/98JS-SC3A].
 4. See Christina A. Cassidy, *County’s Refusal to Certify the Vote Hints at Election Chaos*, AP NEWS (June 15, 2022), <https://apnews.com/article/2022-midterm-elections-biden-new-mexico-voting-machines-7b91e326d2f378898046ec7df779ba20> [https://perma.cc/V3GR-EAFB].
 5. *Id.*
 6. See Charles Homans & Alexandra Berzon, *Arizona County Backs Off Protest, Certifies Election Results*, N.Y. TIMES (Dec. 1, 2022), <https://www.nytimes.com/2022/12/01/us/politics/arizona-county-election-results.html> [https://perma.cc/99KB-8HYF].
 7. *Id.*

I call this phenomenon election obstruction, which I define as election officials' refusal to approve election results without a proper and lawful reason. Election obstruction is a troubling violation of a canvassing board's duties because the set of possible proper, lawful reasons to refuse to approve election results is nil in most jurisdictions. County canvassing boards ensure that vote totals reported by precincts add up with no obvious errors.⁸ They are not set up to adjudicate claims of widespread fraud or irregularities that could alter election results. Those kinds of claims are for election contests, which typically involve a losing candidate challenging the validity of the result in court.⁹ Canvassing boards are only supposed to verify election returns, tally the numbers, and declare the totals.

Election obstruction by canvassing boards was not an uncommon problem in the nineteenth century.¹⁰ It disappeared after courts helped establish a strong norm that canvassing is a ministerial function.¹¹ Its reemergence is directly linked to election denialism, which is the corrosive phenomenon of losing Republican candidates and their supporters making repeated, unsubstantiated claims that election results are illegitimate. In each of the modern examples above, the canvassers latched onto or echoed rhetoric from election deniers. In some cases, the canvassers were proud election deniers themselves.¹²

In these examples, the canvassing boards eventually did their jobs without causing serious harm. So what is the problem with election obstruction? It erodes trust in our democracy, generates costly delays, and risks turning a ministerial government function into a democratic crisis. Just because serious consequences have been averted so far does not mean obstruction is nothing to worry about. If this trend continues, we could see a return to a prior era of widespread obstruction, along with the occasional crisis. The reemergence of obstruction provides an opportunity to reassess canvassing institutions and explore whether there are potential worthwhile reforms.

This Essay first describes how the canvassing process works, the development of the ministerial norm in canvassing, and how recent election denialism has undermined that norm. It then unpacks why election obstruction is a problem. Finally, it points to two possible reforms—diversifying canvassing institutions and bypassing county-level canvassing boards for major races. This Essay argues in favor of a diversified model that creates canvassing boards with members who have a range of professional backgrounds and are selected by a mix

8. See 3 McQuillin Mun. Corp. § 12:44 (3d ed. 2023).

9. See 29 C.J.S. Elections § 400 (2023).

10. See 3 McQuillin Mun. Corp. § 12:44 (3d ed. 2023); 29 C.J.S. Elections § 400 (2023).

11. See *infra* Part I.

12. See *infra* notes 56–57.

of methods. Another reform involves removing county canvassers from the process of certifying national and statewide election results. Local administrators would skip over county canvassers and directly transmit their returns to state canvassers. This would dramatically reduce the number of government bodies capable of obstructing the certification of election winners. It would also bypass the local bodies most likely to respond to the passions of a smaller, misinformed electorate.

I. THE CANVASSING PROCESS, THE MINISTERIAL NORM, AND ELECTION DENIALISM

This Part discusses a basic canvassing process—the counting of returns at the precinct level, the canvassing and certifying results at the county or local level, and the canvassing and certifying of results at the state level. It then takes a brief tour of election obstruction in the 1800s and how courts responded by establishing a strong ministerial norm for canvassing that is still generally the rule today. This Part concludes by observing how election denialism is undermining the ministerial norm.

A. The Decentralized Canvassing Process

After voters cast their ballots, local election administrators tally the results. The tallying process varies among jurisdictions and depends in part on the voting technology used.¹³ In a few jurisdictions, ballot counters go through each paper ballot one by one.¹⁴ In many jurisdictions, voters fill out their ballots by hand and feed them into scanners.¹⁵ In other jurisdictions, voters cast their ballots by pressing the screen or a button on a machine that directly records their votes.¹⁶ Regardless of the technology, the basic vote counting process involves a tally of all precinct-level votes, with local election officials proofing the returns for errors.¹⁷ The local officials transmit these returns to a higher canvassing authority, typically one at the county level.

13. See *Voting Technology*, MIT ELECTION DATA & SCIENCE LAB (2023), <https://electionlab.mit.edu/research/voting-technology> [https://perma.cc/J4JE-54KS].

14. *Id.*

15. *Id.*

16. *Id.*

17. See 3 McQuillin Mun. Corp. § 12:44 (3d ed. 2023).

The primary job of the county canvassing authority is to review and verify the precinct-level election returns.¹⁸ This involves making sure all precincts submitted returns, checking for obvious math errors, tallying vote totals, and approving the final numbers.¹⁹ For local elections, the county canvassing board may also issue the final certification for the winners.²⁰

After the canvassing board approves the vote tallies, it sends them to the state for final review and certification. This could mean sending the results to the chief elections officers, a state canvassing board, or a group of officials that might include the governor.²¹ The state authority reviews each county's totals for obvious errors, adds them up, and certifies the results. Barring an election contest, state certification is the final step in the process for non-presidential elections.

Election contests occur when a losing candidate challenges the validity of an election's result. Election contest procedures are generally set by state statute.²² Typically, they proceed in court after results have been canvassed and there is a final and official vote tally to challenge.²³ Courts presume the election results are valid, and the contesting party has the burden to show irregularities or illegalities sufficient to place the outcome in doubt.²⁴ It is rare for a contestant to come up with sufficient evidence.

B. A Brief History of the Ministerial Norm in Canvassing

The 2020 election was not the first time canvassers obstructed an election. More than a century ago, it was not uncommon for county canvassing officials to refuse to count election returns from precincts or localities.²⁵ Unlike today, fraud was a real problem in nineteenth century elections.²⁶ When nineteenth century

18. County canvassing boards may have other functions, such as preparing a report on the election, which might include information such as the number of individuals registered to vote in the jurisdiction and the number who actually voted. *See, e.g.*, MINN. STAT. § 204C.33 (1981).

19. *See* Election Law Manual, *supra* note 1, at Chapter 8.

20. *See id.*

21. *See* NAT'L ASS'N OF SEC'YS OF STATE, *State Election Canvassing Timeframes and Recount Thresholds* (Sept. 2022), <https://www.nass.org/node/2455> [<https://perma.cc/32MT-YAYY>].

22. *See* 3 McQuillin Mun. Corp. § 12:48 (3d ed. 2023).

23. *Id.*

24. *Id.*; *see also* Hunt v. Crawford, 507 S.E.2d 723, 725 (Ga. 1998).

25. *See e.g.*, Smith v. Lawrence, 49 N.W. 7, 10 (S.D. 1891); State v. Thompson, 139 N.W. 960, 965 (N.D. 1912); Taft v. Haas, 167 P. 306, 310 (Ca. App. 1917).

26. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 200–05 (1992); Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1518 (2002) (noting that by the late nineteenth century, the “secret ballot” was adopted to prevent fraud). On the lack of fraud in contemporary elections, *see* Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and*

county canvassers refused to accept votes, they often cited allegations of fraud as a justification.²⁷ In any individual case, it is difficult to know whether the canvassers thought they were securing a fair result by excluding votes from a corrupt precinct, or whether they were self-interested political actors selectively emphasizing claims of fraud to secure the outcome they wanted. Regardless, courts did not agree that canvassing boards were the right authorities to act on such claims. Courts routinely ordered canvassers to count vote tallies as reported and emphasized their limited ministerial powers.²⁸

An 1859 case from Iowa illustrates this nineteenth and early twentieth century election obstruction dynamic.²⁹ In that case, county canvassers were certifying an election to determine the location of the county seat.³⁰ The canvassers, acting as county officials, may have had a preferred location. They also may have been concerned about allegations of vote buying.³¹ Whatever their motives, the canvassers first rejected the vote returns from several townships for “insufficiency.”³² A state trial court then issued an order, subsequently affirmed by the state supreme court, directing the canvassers to count those returns.³³ But, on the recanvass, the canvassers dug in, claiming the townships’ submissions were not actually election returns.³⁴ This obstruction required a second order from the state supreme court,³⁵ which succeeded in convincing the recalcitrant canvassers to approve the returns.³⁶

Nearly a century and a half ago, the Supreme Court of Kansas summarized misconceptions about canvassers’ power, the law limiting their power, and the basic relationship between canvassing and election contests. In that case, a county canvassing board had refused to count the votes from one precinct, based on allegations that someone stuffed the ballot box with more than one hundred fraudulent ballots.³⁷ The state supreme court held that the canvassing board had to

Stolen Elections in the Contemporary United States, 135 HARV. L. REV. F. 265, 267 (2022) (“[A]ll reliable evidence [shows] that voter fraud in the contemporary United States is rare and that when such fraud occurs it tends to happen on a small scale that does not tip the result of elections.”); Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN L. REV. 1, 20–22 (2007).

27. See *infra* notes 29–37.

28. See *infra* notes 29–37.

29. *State ex rel. Rice v. Smith*, 9 Iowa 334 (1859).

30. *Dishon v. Smith*, 10 Iowa 212 (1859).

31. See *id.* at 214.

32. *Rice*, 9 Iowa at 335 (1859).

33. *Id.* at 336.

34. *Id.* at 336–37.

35. *Id.*

36. *Dishon v. Smith*, 10 Iowa 212, 215 (1859).

37. *Lewis v. Marshall Cty. Comm’rs*, 16 Kan. 102, 102–08 (1876).

tally the returns from the precinct because, as a ministerial body, issues of fraud were not for the canvassing board to adjudicate. In light of modern election obstruction's echoes from this bygone era, it is worth turning back to the Kansas Supreme Court's doctrinal language:

[I]t is a common error for a canvassing board to overestimate its powers. Whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct and practices at the election, it is apt to imagine that it is its duty to inquire into these alleged frauds, and decide upon the legality of the votes. But this is a mistake. Its duty is almost wholly ministerial. It is to take the returns as made to them from the different voting precincts, add them up, and declare the result. Questions of illegal voting, and fraudulent practices, are to be passed upon by another tribunal. The canvassers are to be satisfied of the genuineness of the returns, that is, that the papers presented to them are not forged and spurious; that they are returns, and are signed by the proper officers; but when so satisfied, they may not reject any returns because of informalities in them, or because of illegal and fraudulent practices in the election. The simple purpose and duty of the canvassing board is to ascertain and declare the apparent result of the voting. All other questions are to be tried before the court for contesting elections, or in *quo warranto* proceedings.³⁸

Today, treatises and courts across the country, echoing the Kansas Supreme Court, describe the canvassing process as lacking discretion,³⁹ with the canvassing board acting as “a neutral body whose functions are ministerial in nature.”⁴⁰ When states do afford discretion, it is limited. Minnesota, for example, lets boards correct an “obvious error” in the vote total, as long as it is apparent on the face of the returns and does not require an examination of ballots.⁴¹ Canvassing boards in New York can invalidate particular ballots, if they were improperly marked, and subtract them from the total.⁴² The general rule, though, is that canvassing boards lack the power to determine the validity of ballots, a function that is better performed through the adjudication of election contests.⁴³ And even canvassing

38. *Id.* at 108.

39. *See, e.g.*, 29 C.J.S. Elections § 400 (2023).

40. *Morse v. Dade Cty. Canvassing Bd.*, 456 So. 2d 1314, 1316 (Fla. Dist. Ct. App. 1984).

41. *Coleman v. Ritchie*, 762 N.W.2d 218, 227 (Minn. 2009).

42. *Alessio v. Carey*, 883 N.E.2d 352, 352–53 (N.Y. 2008) (examining a canvassing board that invalidated seven absentee ballots because they had intentional, extrinsic marks); *In re O'Shaughnessy*, 223 N.Y.S.2d 408 (N.Y. App. Div. 1961) (discussing the powers of Inspectors of Election and Board of Elections).

43. *See, e.g.*, *Reed v. City of Montgomery*, 376 So. 2d 708, 711 (Ala. 1979).

boards that have exercised their power to invalidate a handful of improperly marked ballots have not claimed the authority to address questions of widespread fraud or irregularities.

Election obstruction in 2020 and 2022 occurred in jurisdictions that follow the general rule that canvassing is a ministerial duty. Take Michigan as an example. More than a century ago, Michigan’s state supreme court declared that a canvassing board performs a ministerial duty, with no power to consider allegations of irregularities.⁴⁴ This law did not change over the many intervening years and was still the established precedent of the state in 2020.⁴⁵ Nevertheless, following the 2020 canvassing fiasco, Michigan amended its constitution to make extra clear that the canvassing function is a “ministerial, clerical, nondiscretionary duty.”⁴⁶ In New Mexico and Arizona, the relevant statutes do not grant canvassers discretion, and caselaw provides that canvassing is ministerial.⁴⁷ It seems unlikely that the canvassers in 2020 and 2022 were simply ignorant of the ministerial rules in their jurisdictions. More likely, the election denialist movement, coupled with structural flaws in the design of the canvassing institutions, enabled their acts of obstruction, as discussed below.⁴⁸

C. The Relationship Between Election Denialism and Election Obstruction

Election denialism—that is, false or unsupported claims that the process or result of an election was illegitimate—is one of the most important phenomena in contemporary politics.⁴⁹ It has become a sickness in our democracy, with

44. *Att’y Gen. v. Bd. of Sup’rs of Genesee Cty.*, 131 N.W. 163, 164 (Mich. 1911).

45. *See Johnson v. Sec’y of State*, 951 N.W.2d 310, 311 (Mich. 2020) (Clement, J., concurring) (“[I]t is the settled law of this State that canvassing boards are bound by the return, and cannot go behind it, especially for the purpose of determining frauds in the election. Their duties are purely ministerial and clerical.”) (quoting *McQuade v. Furgason*, 51 N.W. 1073 438, 449 (Mich. 1892)).

46. MICH. CONST. art. II, § 7(3), *amendment approved* Nov. 8, 2022.

47. *See, e.g., Laumbach v. Bd. of Cnty. Comm’rs of San Miguel Cnty*, 290 P.2d 1067, 1069 (N.M. 1955) *State v. Osborne*, 125 P. 884, 888 (Ariz. 1912) ARIZ. REV. STAT. ANN. § 11–251 (2016); N.M. STAT. ANN. §§ 1–13–1 (West 2019).

48. A recent article argued for removing discretion from canvassing boards that have too much of it, pointing to the debacle in Wayne County, Michigan, in 2020, as an example. Hasen *supra* note 26, at 297, n.159. Michigan law, however, was and is no exception to the general rule that canvassers lack discretion. This Essay argues that lasting solutions are more likely found in reforms to canvassing institutions.

49. *See Election Denial in Races for Election Administration Positions*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/series/election-denial-races-election-administration-positions> [https://perma.cc/MW2U-K5CY].

antecedents in conspiracy theories and racial resentment.⁵⁰ There is a direct line from election denialism to election obstruction.

Election denialism took off in 2016, when then-candidate Donald Trump declared that the upcoming election for president would be rigged.⁵¹ It gained significant force following Trump's defeat in 2020, when Trump refused to publicly concede the election to Biden, culminating in the violent storming of the U.S. Capitol Building on January 6, 2021. Trump's refusal to acknowledge defeat led a majority of Republican voters to believe Biden's victory was illegitimate.⁵² Election denialism has continued post-Trump, with candidates at many levels echoing unsubstantiated claims of fraud and election conspiracies.⁵³ Election denialism has been embraced by large numbers of Republican voters, particularly those with a predisposition to believe in conspiracies and with strong feelings of racial resentment.⁵⁴

Election obstruction is directly tied to denialist rhetoric. The Wayne County, Michigan, canvassing board members initially refused to canvass results at a time when Trump was declaring that Detroit, the country's largest majority-Black city,⁵⁵ was one of "the most corrupt political places anywhere in our country, easily" and should not be allowed to "engineer[] the outcome of a presidential race, a very important presidential race."⁵⁶ Around the time the Republican canvassers for Cochise County, Arizona, refused to canvass the 2022 midterm results, the

50. See Charles Stewart III, *Public Opinion Roots of Election Denialism* (SSRN, Working Paper, Jan. 4, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4318153 [https://perma.cc/B7AC-PW3U].

51. See JONATHAN MARTIN & ALEXANDER BURNS, *THIS WILL NOT PASS: TRUMP, BIDEN, AND THE BATTLE FOR AMERICA'S FUTURE* (2022).

52. See *Voters Reflections on the 2020 Election*, PEW RSCH. CTR. (Jan. 15, 2021), <https://www.pewresearch.org/politics/2021/01/15/voters-reflections-on-the-2020-election/> [https://perma.cc/5FQA-F3AZ].

53. See, e.g., Zoha Qamar, *Election Denialism Lives On, Even as Candidates Who Support It Concede*, FIVE THIRTY-EIGHT (Nov. 18, 2022), <https://fivethirtyeight.com/features/election-denialism-lives-on-even-as-candidates-who-support-it-concede/> [https://perma.cc/89Y9-R772].

54. See Stewart, *supra* note 50.

55. Comments like these from Trump are an example of how racist rhetoric has been used to encourage election obstruction.

56. See Daniel Dale, *Fact Check: Trump Delivers the Most Dishonest Speech of His Presidency as Biden Closes in on Victory*, CNN (Nov. 6, 2020), <https://www.cnn.com/2020/11/05/politics/fact-check-trump-speech-thursday-election-rigged-stolen/index.html> [https://perma.cc/LN8F-8D5U].

Republican candidate for Arizona’s governor was modeling herself after Trump by making false claims that her race was stolen from her.⁵⁷

The ties between election denialism and election obstruction were especially strong for rural Otero County, New Mexico, whose canvassing commission refused to canvass primary results in 2022. One of the obstructing commissioners was cofounder of “Cowboys for Trump” and was convicted of illegally entering the Capitol on January 6, 2021.⁵⁸ He had posted a video at the time saying, “[t]here’s going to be blood running out of that building.”⁵⁹

These examples provide support for a few theories on how election denialism can lead to election obstruction. First, as in Michigan, the canvassers may respond to pressure from high-level members and candidates of their own party, who are using denialistic rhetoric to support an attack on election results. Second, as was the case in New Mexico, the canvassers themselves may have become true believers willing to act on election conspiracies. Third, the canvassers may have political incentives to respond to the preferences of election deniers amongst the voting public, especially if canvassers are elected in jurisdictions that include large numbers of election deniers. This is mostly because self-interested elected officials are often responsive to the preferences of impassioned constituents and voters.

II. THE PROBLEM WITH ELECTION OBSTRUCTION: DISTRUST, CRISES, AND DELAYS

A key problem with election obstruction is that it reinforces antidemocratic messaging by backing up denialist rhetoric with official action.⁶⁰ It is bad enough for losing candidates to claim they were robbed. But when election officials act on

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57. See Daniel Dale, *Fact Check: Kari Lake’s Continuing False Election Claims*, CNN (Jan. 31, 2023), <https://www.cnn.com/2023/01/31/politics/fact-check-kari-lake-140k-fraudulent-ballots/index.html> [https://perma.cc/V8RL-84NW]; James Oliphant, *Arizona Republican Lake Presses Stolen Election Claims in Court*, REUTERS (Dec. 21, 2022), [https://www.reuters.com/legal/arizona-republican-lake-presses-stolen-election-claims-court-2022-12-21/#:~:text=Dec%2021%20\(Reuters\)%20%2D%20Lawyers,invalid%20and%20should%20be%20overturned](https://www.reuters.com/legal/arizona-republican-lake-presses-stolen-election-claims-court-2022-12-21/#:~:text=Dec%2021%20(Reuters)%20%2D%20Lawyers,invalid%20and%20should%20be%20overturned) [https://perma.cc/FHS8-75TP].
58. See Morgan Lee, *GOP Commission Refuses to Certify New Mexico Primary Vote*, AP NEWS (June 15, 2022), <https://apnews.com/article/2022-midterm-elections-new-mexico-voting-election-recounts-general-54745f2169166e82090d0f7bc1ddc1b2> [https://perma.cc/DSM5-BYS2].
59. Rachel Knapp, *Otero Co. Commissioner, Cowboys for Trump Leader’s Comments Under Fire*, KRQE (Jan. 8, 2021), <https://www.krqe.com/news/politics-government/otero-co-commissioner-cowboys-for-trump-leaders-comments-under-fire> [https://perma.cc/P26Q-AJFX].
60. For an in-depth examination of the dangers of denialistic rhetoric, see RICHARD L. HASEN, *CHEAP SPEECH* (2022).

false claims, it gives those claims more credence and can reinforce conspiratorial views. In this way, each act of election obstruction can solidify support for election conspiracies and other false claims.

While this antidemocratic harm has thus far remained gradual and with only limited effects, it is not hard to imagine an actual crisis emerging from election obstruction. If canvassers were to persist in refusing to approve and declare results, there would be no official winners. A fundamental part of our democracy is the transfer of power to the elected winner—but that transfer cannot take place until the results are final and certified.

So far, we have avoided a crisis because the obstructing canvassing boards have fallen in line after public blowback or a court order. But what would happen if a majority of canvassers on a board were willing to accept a contempt of court finding rather than follow a court order? Some canvassers might be willing to risk jail time to obstruct an election if they thought it would further their careers. They might think a base of voters will rally toward them in future elections, or that their party will reward them with a plum appointment. What then? If a quorum of canvassers were sitting in jail, who would canvass the results and declare the official totals? It is possible to imagine various judicial remedies involving removal of the canvassers and the appointment of replacements. But what, precisely, that would look like is uncertain, as is the potential damage inflicted by canvassers sending out messages of martyrdom and election denialism from behind bars.

Another cost of election obstruction—less abstract than democratic distrust and less existential than full-throated democratic crisis—is the cost of delay when the canvassing board refuses to canvass and declare results. One minor cost from this delay comes from the actual administration of a drawn-out government process that should take no longer than an afternoon. Delays in the canvassing process can snowball into larger, more consequential delays because canvassing deadlines are tied to other election deadlines, like those for recounts and election contests.⁶¹ A reviewing court might have to decide whether a delayed canvass eats into the time to file for a recount or pushes back those deadlines. If the court decides that the delay reduces the time to file for a recount, a challenging candidate loses time on an important part of a fair election contest. If the court decides to push back the filing deadlines, the delays can add up to undermine the values of timeliness and finality that are integral to a well-run election system.

Election obstruction damages democratic norms and sews distrust in democratic processes. That, by itself, is bad enough. But, if left unchecked, it could risk the democratic transfer of power for offices up and down the ballot. It is

61. See 26 Am. Jur. 2d *Elections* §§ 367, 394 (2023).

difficult to know how likely it is that obstruction will generate a crisis. Perhaps the 2020 and 2022 elections were blips, and canvassers across the country will return to their ministerial jobs without issue in future elections. But, as long as election denialism remains a potent political force, the risk of election obstruction will persist and may increase.

III. DESIGNING CANVASSING INSTITUTIONS TO MINIMIZE THE RISK OF ELECTION OBSTRUCTION

This Part explores two solutions to mitigate the risk of election obstruction. First, it describes three basic models for the selection of members to canvassing boards: elected, appointed, and diversified.⁶² It analyzes the benefits and costs of these models and argues in favor of the diversified model. This Part also explores a second solution: bypassing county-level canvassing boards for national and statewide elections. Under this approach, local election officials would transmit results straight to state canvassing authorities. By taking counties out of the picture, it would eliminate thousands of possible sources of election obstruction, including the sources most likely to engage in obstruction in today's political environment.

A. Three Methods for Selecting Canvassing Board Members: A Comparative Institutional Analysis

1. The Elected Model

Under the elected model, voters directly elect their county canvassers. This model is used in Arizona, where the board of supervisors who perform the canvass are elected from districts within the county.⁶³ It is also used in New Mexico, where elected county commissioners are responsible for the county canvass.⁶⁴

One theoretical advantage of this model is the accountability that comes from democratic elections. The risk, however, is that it can turn a ministerial government function into an exhibition for highly partisan politics. Passionate partisan voters may want and reward canvassers willing to put aside their

62. I devised this typology from my own research looking over various state statutes on this topic. To my knowledge, this essay is the first to breakdown these statutes into these three categories.

63. See ARIZ. REV. STAT. ANN. §§ 11-211, 11-251, 16-642, 16-648 (2022).

64. See N.M. STAT. ANN. §§ 1-13-1, 1-13-13, 4-38-6 (2020).

ministerial duties and refuse to declare election results when their party has lost.⁶⁵ Similarly, when elections select all members of a canvassing board within the same county, there is a heightened risk that they will share the same biases.⁶⁶ This makes it more likely that a majority of members will agree to take the same biased action.

These risks played out in 2022, when elected canvassing officials in rural counties in Arizona and New Mexico refused to declare election results, until ordered to by judges.⁶⁷ The risk of an elected model leading to election obstruction is especially high in rural counties, where election denialism has gained a strong foothold.⁶⁸ Until election denialism becomes a less potent force, the elected model will continue to come with a high risk of obstruction.

2. The Appointed Model

A common model for county canvassing boards involves the appointment of members by state or county officials, with some mechanisms in place to ensure bipartisan representation. In Wyoming, for example, the county canvassing board consists of two members of each major political party, who are appointed by the county clerk.⁶⁹

One advantage of this model is that it can ensure some diversity of political viewpoints. If canvassers are inclined to take overt partisan actions, there will at least be some members who can register their dissent and publicly raise alarms. The disadvantage is that there is still a substantial risk of partisan bias. It is not uncommon for local political parties to hold sway over who gets named to these positions.⁷⁰ Canvassers may then respond to pressure from the party that placed them on the board. Principal-agent theory can illustrate this problem. A principal will generally select an agent it can trust to act on its preferences. In canvassing, when the principal is a partisan appointing authority, it will want to select canvassers who can be trusted to follow those partisan preferences. Political party

65. Cf. Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. OF LEGAL ANALYSIS 185, 187 (2014) (“sometimes even a fully rational but imperfectly informed principal (e.g., the citizens) will reward ‘bad’ actions rather than ‘good’ actions”).

66. See Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1454 (2011).

67. See Cassidy, *supra* note 4; Homans & Berzon, *supra* note 6.

68. See Stewart, *supra* note 50.

69. See WYO. ELECTION CODE § 22–16–101 (2021).

70. In some states, the canvassing statutes contemplate that the political parties will control the selection of some appointments. See, e.g., WIS. STAT. § 7.60(2) (2020) (providing that political party county committees provide the clerk a list of canvassing candidates to choose from).

leaders will therefore look to appoint canvassers who have sent strong signals that they are loyal partisans.

Michigan provides an example of this risk. Michigan's county canvassing boards consist of four members, appointed by county officials, with no political party holding more than two of the seats.⁷¹ When it came time to declare the results from Wayne County in 2020, the two Republicans balked in response to Trump's claims of a stolen election, depriving the board of a majority, as discussed above.⁷² While the canvassers eventually relented, local Republicans have since selected a new Wayne County canvasser who vowed he would not have capitulated in 2020 and would have steadfastly refused to approve the results.⁷³ That is, the local party opted for someone publicly committed to election obstruction. If he can bring along the other Republican member in 2024, there remains the risk of election obstruction from this appointed model in Michigan. Similar risks could exist in other jurisdictions that use the appointed model.

3. The Diversified Model

The diversified model involves diversifying canvassing boards along a few possible dimensions, including how members are selected, their professional backgrounds and day jobs, and the level of government they represent. When canvassing bodies are diversified, their members have different perspectives and are responsive to a range of different interests and superiors. It is harder for one candidate's campaign or one political party to capture and influence the voting decisions of a highly diversified canvassing body.

Minnesota illustrates a diversified approach. There, a canvassing board consists of the county auditor, the court administrator of the district court, the mayor or chair of the town board of the county's most populous municipality, and two members of the board that runs the county government.⁷⁴ This makeup includes several different dimensions of diversity. First, some members are elected, like the mayor and county board positions, while others are appointed.

71. See MICH. COMP. LAWS ANN. § 168.24c (2022).

72. See Astor, *supra* note 3.

73. See Clara Hendrickson, *Next GOP Wayne County Canvasser Says He Would Not Have Certified Results of 2020 Election*, DETROIT FREE PRESS (Oct. 18, 2021), <https://www.freep.com/story/news/local/michigan/detroit/2021/10/18/new-wayne-county-gop-canvasser-wouldnt-have-certified-vote/8506771002/> [https://perma.cc/H3GK-ETTJ].

74. MINN. STAT. § 204C.31 (2022).

The court administrator is hired by the chief judge of the county,⁷⁵ and the county auditor is often an appointed official.⁷⁶ Second, the members have diverse professional backgrounds and day jobs. While some members are obviously politicians, the auditor and court administrator are public servants tasked with making the government run. The auditor, for example, has financial and tax-related duties for the county.⁷⁷ The court administrator manages the courthouse.⁷⁸ Finally, there is also diversity based on the level of government the elected members represent, with a mayor responsive to a city electorate and commissioners responsive to a county electorate.

A diverse design for canvassing has a couple of benefits that can guard against election obstruction. First, diverse canvassing boards have less correlated biases: when board members are all elected or appointed in the same way, they are likely to exhibit the same types of biases.⁷⁹ For example, when a local political party hands out canvassing seats, the same type of party loyalist might continually get rewarded. When membership selection is varied, it is less likely that a select group of partisans will occupy all the seats on the board. Similarly, diversity helps guard against groupthink and cascading errors, when one group member follows another's erroneous decision.⁸⁰ Group members with different perspectives and backgrounds are less likely to uncritically copy each other. On canvassing boards, this means a single, vocal member advocating for election obstruction is less likely to find multiple adherents.

Second, political parties or interests will have a harder time placing loyalists on the board because it takes more resources and power to capture a board chosen by multiple selection methods. When board members are appointed the same way every four years, it is relatively easy for parties to capture and control that single process. But, when members gain their seats through several different election and appointment channels, a party will need more resources to gain and keep control of all those channels.

Similarly, capture is costlier when the board includes *ex officio* members who hold their canvassing positions by virtue of being appointed to a different office. Consider the court administrator in Minnesota. The chief judge in the district

75. See MINN. STAT. § 484.68 subd. 1 (2022).

76. See, e.g., *Heather Bestler Named Director of Property Tax, Records and Election Services*, RAMSEY COUNTY (Mar. 29, 2021), <https://www.ramseycounty.us/content/heather-bestler-named-director-property-tax-records-and-election-services> [https://perma.cc/JB9Q-DQ98].

77. See MINN. STAT. §§ 276A.01-.09 (2022).

78. See MINN. STAT. § 484.68 subd. 3 (2022).

79. See Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2245 (2009).

80. See *id.* at 2253.

hiring the court administrator cares about finding someone who can run an efficient, and hopefully fair, court system. If the chief were to hire someone purely based on their political loyalty with no regard for their competence, they might also suffer a poorly run courthouse. Another example is the county auditor who also sits on Minnesota's county canvassing boards. Counties hire auditors to oversee large budgets and provide essential constituent services. A county selecting an auditor on the basis of partisan loyalty risks significant headaches in county administration. The fact that the court administrator and auditor positions perform important functions which have nothing to do with canvassing makes it harder and costlier for political parties to fill those positions with party loyalists.

The diversified model does have at least one disadvantage: it diffuses accountability in the event that the canvassing process was botched. In the elected model, there is a direct line of accountability between voters and canvassers. Even in the appointed model, there is a line of accountability between the appointors and the canvassers. In a diversified model, with canvassers gaining their seats through multiple channels, the lines of accountability are spread out. While this makes capture harder, it also makes it harder for voters to know who to hold accountable. The diffusion of accountability, however, is not a substantial cost to the model, because canvassing is a ministerial, not policymaking, function. Ideally, the only errors reviewed by canvassers are ministerial or clerical—for example, review of a sum marked incorrectly. These are not the types of errors that usually benefit from political accountability.⁸¹ Overall, the greater risk of error is likely to come from a canvassing board that is too close to politics, not too far away.

B. Bypassing County Canvassing Boards in National and Statewide Elections

Another possible design solution is to bypass county canvassing boards when certifying national and statewide races. Local officials would send the precinct-level returns directly to the state, instead of first going to the county for tallying and approval. The state canvassers would proof the precinct returns, tally the votes, and certify the winners.

81. In addition, there are theories showing that “a moderate degree of bureaucratic insulation alleviates rather than exacerbates the counter-majoritarian problems inherent in bureaucratic policymaking.” Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008).

This design would significantly reduce the chances of election obstruction. This is partly a matter of simple math. There are fifty states, but thousands of counties. Removing counties from the canvassing process would mean far fewer canvassing bodies that can cause mischief. Take Texas as an example. It has 254 counties.⁸² County commissioners canvass election results for statewide offices, Congress, and president.⁸³ This means there are 254 opportunities for a just a few local officials to derail the certification of results for the most important races. It is not hard to imagine a future election when, in response to a Democrat winning statewide in Texas for the first time in decades, one of the 254 counties decides to obstruct the victory by claiming fraud. But, if only one state body were responsible for final certification, the statistical likelihood of obstruction would decrease substantially.

Bypassing county canvassers also means skipping a level of government more likely to respond to a smaller and impassioned, but misinformed, electorate. If we assume county canvassers have preferences that roughly align with the voters in their counties, canvassers from counties with more election denialism will be much more likely to hold and act on these views than canvassers at the state level. These extremist, denialist views can manifest as election obstruction, a dynamic that played out in elections in both 2018 and 2022.

More specific to today's political landscape, bypassing counties means taking opportunities for obstruction away from the representatives of rural counties, where election denialism has most taken hold.⁸⁴ If canvassers from counties like Otero County and Cochise County continue to turn their ministerial jobs into a potentially dangerous political sideshow, a simple design solution is to remove counties from the process.

There are tradeoffs to bypassing county-level canvassers, though. Most problematically, it shifts more work up to the state level, and state canvassing bodies may not be set up for the tallying and proofing of precinct-level data. State canvassing bodies often include high-level state officials, such as the governor or secretary of state. Canvassing at the state level would take longer if it involved tallying precinct returns, instead of looking at county reports that already have aggregated the precinct data. This may not be a huge problem for small states, where the overall state population is less than that of a large county in other states.

82. For a list of the 254 counties, see *County List (Alphabetical)*, 254 TEX. COURTHOUSES, <http://www.254texascourthouses.net/county-list-alphabetical.html> [https://perma.cc/YF7-QRE5].

83. See TEX. ELEC. CODE §§ 3.003, 67.002 (2022).

84. See Blake Hounshell, *Was Election Denial Just a Passing Threat?*, N.Y. TIMES (Nov. 28, 2022) <https://www.nytimes.com/2022/11/28/us/politics/election-deniers-2022-midterms.html> [https://perma.cc/P87Y-4PXE].

But, in larger states, it would involve a massive shift of work up to the state level. If larger states were interested in this approach, they might have to rethink their canvassing processes in other ways. For example, states might need to lengthen the amount of time for the state-level canvass and involve more technocrats to crunch the numbers.

Some small states in New England, like Vermont and New Hampshire, already bypass counties for national and statewide races.⁸⁵ Officials in towns, cities, or wards count the ballots and transmit the returns to the state.⁸⁶ States that want to bypass counties could look to these New England states as models. But differences in size could make it difficult to replicate. In addition, these states have a long history of conducting elections this way. Other states may experience opposition if they were to reduce the role of counties in the election process. Ultimately, though, if county canvassers are most responsible for modern election obstruction, skipping them could prove an effective remedy.

Another possible counterargument is that consolidating canvassing duties at the state level would give state officials the chance to obstruct elections. This risk, though, already exists. In many states, after county canvassing boards approve their results and submit them to the state, the state officials could obstruct and refuse to approve them. To date, they have not. Perhaps consolidating canvassing duties at the state level would increase pressure on state officials to obstruct. But it is not at all clear that, with county officials out of the picture, state canvassing officials would have increased motivations or incentives to obstruct. Overall, eliminating the role of county canvassing boards would substantially reduce the number of officials with the opportunity to obstruct and would eliminate the roles of the officials most likely to respond to the passions of voters in the disparate counties where election denialism has taken hold.

The hyper decentralization of election oversight, with so much left to local and county-level officials, makes the United States an oddity among democratic nations.⁸⁷ In theory, this decentralization can make it harder to steal an election by diffusing power among so many different officials at different levels of government.⁸⁸ The idea is that no single party can capture the machinery of election administration when there are thousands of local officials, and not just fifty chief elections officers to influence. This theory, though, fails to account for

85. See VT. STAT. ANN. tit. 17, § 2592 (2017); N.H. REV. STAT. §§ 659:70, :75, :81, & :92 (2022).

86. See sources cited *supra* note 81.

87. See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 82–133 (2004).

88. See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. POL'Y REV. 125, 141 (2009).

the salient problem of election obstruction. By pushing power down to thousands of local officials sitting on county canvassing boards, our system gives each of those officials a chance to obstruct an election by refusing to approve results. To reduce this risk, we either need to design and maintain robust institutions that can check possible obstruction by election officials or create a more decentralized system that gives fewer officials the chance to obstruct.

CONCLUSION

With the rise of election denialism, election obstruction has reemerged as a problem for our democracy. So far, we have averted real crises. But, as long as election denialism festers, significant risks remain.⁸⁹ This Essay provides a couple of design solutions to guard against election obstruction. These solutions—diversifying canvassing institutions and bypassing county canvassers—do not depend on regulating campaign rhetoric or defeating a particular candidate at the ballot box. They are solutions any legislature can consider and enact into law to protect longstanding democratic norms in our election processes.

89. See Doug Bock Clark, *Some Election Officials Refused to Certify Results. Few Were Held Accountable.*, PROPUBLICA (Mar. 9, 2023, 5 a.m.), <https://www.propublica.org/article/election-officials-refused-certify-results-few-held-accountable> [https://perma.cc/ 8Y42-7QKE].