



Public Health, Internal Borders, and the Ends of Federalism

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Abstract

Questions concerning border closures during pandemics often focus on international borders or rights-based considerations. Closures of internal borders in federal countries, such as Canada, raise independent concerns regarding who can close internal borders when. Those questions are not exhausted by rights-based considerations and cannot be resolved using brute empirical measures. They instead implicate the nature and ends of federalism. This text uses the case of internal border restrictions in Canada during COVID-19 to explore whether the kinds of closures that took place there can be justified on federalism grounds. It argues that the case for provinces being able to unilaterally enact interprovincial border closures in federal countries, as observed in Canada during COVID-19, do not withstand scrutiny. It attends to possible justifications for federalism to demonstrate that the best arguments for federalism do not support provincial control over borders that justify provinces possessing, let alone exercising, unilateral authority to close interprovincial borders to persons residing in other provinces.

Keywords: COVID-19, constitutional law, constitutional theory, pandemics, inter-governmental relations

Résumé

Les questions relatives à la fermeture des frontières en cas de pandémie sont souvent centrées sur les frontières internationales ou sur des considérations liées aux droits fondamentaux. La fermeture des frontières intérieures au sein des états fédéraux, comme le Canada, soulève toutefois d'autres questionnements sur les

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enjeux de compétences, notamment à savoir qui peut fermer les frontières intérieures et à quel moment. Ces questions ne se limitent pas aux considérations fondées sur les droits fondamentaux et ne peuvent être résolues par des mesures empiriques brutes. Elles se rapportent plutôt à des interrogations sur la nature et les objectifs du fédéralisme. Dans cette voie, ce texte utilise le cas des restrictions aux frontières intérieures du Canada pendant la COVID-19 pour se demander si ce type de fermeture peut être justifié par le biais du fédéralisme. Cet article soutient que les arguments en faveur de la possibilité pour les provinces de décréter unilatéralement des fermetures de frontières interprovinciales dans les états fédéraux, comme cela a été observé au Canada pendant la COVID-19, ne résistent pas à un examen minutieux. En particulier, cet article examine les diverses justifications du fédéralisme pour démontrer que les meilleurs arguments en faveur de ce régime ne soutiennent pas un contrôle des frontières par les provinces, tout comme ils récuse l'idée que les provinces se revendiquent et utilisent un pouvoir unilatéral pour fermer les frontières interprovinciales aux personnes résidant dans les autres provinces.

Mots clés: COVID-19, fédéralisme, droit constitutionnel, théorie constitutionnelle, frontières, pandémies, relations intergouvernementales

For many countries, the story of pandemic governance is partly a story of federalism. Pandemics make questions about who can and should make final decisions on subjects (e.g., public health) or issues (e.g., vaccination centre locations) acute even before anyone invokes emergency powers that challenge a decision-making authority status quo. Clarity on who can and should make decisions about everything from illness testing centre placements to international border closures is necessary to understand the tools available to address pandemics (Da Silva 2021).

This article focuses on an often-overlooked aspect of the relationship between federalism and pandemic management with implications for basic questions about the nature of federalism: decision-making authority over interprovincial border controls. It asks whether, when, and (if so) why provinces (a generic referring here also to US/Australian “states,” Swiss cantons, German *lander*, etc.) in federal countries should be able to close borders absent federal agreement. Prior debates focused primarily on mobility rights. Questions about whether provinces can or should have authority to close borders consistent with rights norms have received comparatively little scrutiny.

COVID-19 set a precedent whereby many accepted provincial closures absent explicit federal input. Such closures are not obviously legitimate. I demonstrate that prominent arguments for federalism cannot justify interprovincial border restrictions absent federal involvement. I restrict analysis to federal countries where at least two levels of government each have distinct decision-making authority over at least one subject. I distinguish “federal governments” with centralized authority and “provincial governments” with authority over a more limited territory. The primarily moral arguments below likely have implications for the distribution of final decision-making authority in non-federal countries and border control in many countries. But the more doctrinal and empirical claims are predominantly Canadian, and morality alone may sometimes prove inconclusive, requiring

appeals to a country's specific rules. This further limits the scope of my claims and some opportunities to use the following in other constitutional contexts.

I. Inter-Provincial Border Closures During COVID-19

There is no uniform pattern in which types of federal countries adopted inter-provincial border restrictions during COVID-19.¹ Examples arose in Australia, Argentina, Mexico, Brazil, and Germany (Murphy and Arban 2021; Steytler 2022b, 409; Hegele and Schnabel 2021, 1065). Interprovincial border closures can result from exclusively federal decision-making, joint federal–provincial decision-making (with either having “final” decision-making authority or both needing to agree), single provincial decision-making whereby a province decides to close “its” borders, or joint provincial decision-making where provinces agree on closures and terms thereof. They can differ in scope and length. A closure may, for instance, only apply for a few days or extend over months. It may apply to residents of all other provinces or only some. And it can admit numerous exceptions (for, e.g., family reunification, trade) or apply more strictly.

The Canadian experience exemplifies some differences in forms of closures, providing a good case study. Movement across the border between Quebec and Ontario was limited early in the pandemic (Flood and Thomas 2020, 107). Manitoba likewise placed restrictions on those travelling to that province (Hoult and Potter 2021, 40).² These closures were rather short compared with what came to be known as the “Atlantic Bubble,” which arose when Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland and Labrador permitted free travel throughout the region for their residents but limited access for residents of other Canadian provinces. It was initially characterized as a border closure and stayed that way at times for some provinces. But it eventually led to highly conditional access amounting to closures to anyone seeking short-term access: with few exceptions, residents of other provinces had to (at minimum) undergo fourteen days’ isolation on arrival (e.g., Hoult and Potter 2021; Poirier and Michelin 2022) (with further restrictions in some provinces). The Bubble also exemplified how provinces worked together in a form of joint decision-making, though the scope of the Bubble sometimes changed as epidemiological conditions shifted. Provinces believed they had final authority on whether to open/close inter-provincial borders.

This article focuses on “strictly provincial” decisions to place severe limitations on interprovincial mobility that constitute *de facto* closures for many absent explicit federal involvement. Such closures have a clear impact on mobility rights, but litigation on their constitutionality on division of powers (rather than human/constitutional rights) grounds was, to my knowledge, limited. Successful challenges

¹ Nico Steytler (2022b, 398) suggests “the prospect of self-isolation” is more limited in “smaller federations, with high interconnectivity,” such as Switzerland and Belgium. Germany and Mexico, at least, complicate even this basic finding. On size, see also Saunders (2022, 377) (contrasting Switzerland and Austria with Australia and Canada).

² Quebec and Manitoba were also among provinces that limited travel between regions within their respective provinces.

on any grounds appear rarer. Indeed, while Argentinian closures were found unconstitutional, litigation elsewhere often did not even result in final decisions (again see, e.g., Steytler 2022b, 409; Hegele and Schnabel 2021, 1065).

Judgments that occurred often favoured governments. For instance, Western Australian restrictions were deemed constitutional in *Palmer v. Western Australia* despite a constitutional guarantee of “absolutely free” interprovincial travel. Likewise, claimants challenged Newfoundland and Labrador’s component of the Bubble scheme in *Taylor v. Newfoundland and Labrador*. They suggested restrictions were ultra vires provincial authority and violated mobility rights in section 6 of the *Canadian Charter of Rights and Freedoms*. But the trial court found them intra vires a provincial public health power and proscribed by law, justifiable in a free and democratic society, and thus constitutional.

That there was minimal litigation on these matters is somewhat surprising as the constitutionality of these restrictions is non-obvious and even closures within formal provincial authority raise questions about their relationship to other valid pieces of legislation. I discuss jurisdictional questions in Canada in a case study analysis below. Questions concerning whether provinces even possessed authority to close interprovincial borders absent explicit federal involvement also arose elsewhere. For instance, while many took Australian states’ constitutional authority to impose border restrictions for granted, with even the federal government of Australia instead questioning the closures’ necessity (Murphy and Arban 2021, 640), others considered the laws “constitutionally suspect” from the outset (Steytler 2022b, 409). Even those who accept provincial authority over borders admit they raise difficult practical and jurisdictional questions (e.g., Houlton and Potter 2021 (on Canada)).

II. The Limits of Doctrinal or Empirical Analyses

Two plausible approaches to questions about interprovincial border restrictions raise issues, requiring a theoretical approach. Doctrinal answers vary and are often incomplete. Empirical assessment of COVID responses in federal countries, including Canada, do not yield clear answers one can use in other cases. This justifies turning to first principles of federalism.

1. Doctrinal Considerations

Doctrinal questions about who possesses such authority should be resolved by attending to available constitutional documents. But legal doctrine on this point is not always clear. And analyzing what to do in the absence of doctrinal clarity has implications for choices countries *should* make when deciding who has relevant authority and how courts should interpret powers.

Canada’s lack of doctrinal clarity again makes it a fruitful example. Canadian provinces do not obviously “own” their borders in the way states do in international law (Da Silva and St-Hilaire 2021). No constitutional text provides them with clear authority to control borders with other provinces. Some (admittedly limited) legal doctrine challenges provincial claims. For instance, section 121 of the *Constitution Act 1867* provides for free trade across the provinces. “Alteration” of provincial borders then requires the consent of the federal government and all impacted

provinces under the constitutional amendment rule in section 43 of the *Constitution Act, 1982*. Many constitutional documents establishing provincial boundaries are acts of the British Parliament and do not clearly delegate future authority over those boundaries to other entities, but earlier colonial practice suggests the federal government was widely viewed as inheriting power over such borders.³ And Canadian provinces famously cannot unilaterally limit border access via secession (e.g., *Reference re Secession of Quebec*).

The federal power to legislate for the “Peace, Order, and good Government” of Canada under section 91 of the *Constitution Act, 1867*, has, in turn, been interpreted as providing the federal government with residual authority over matters not explicitly falling under other heads of powers and authority over matters of “national concern” understood as those having extra-territorial dimensions that provinces alone cannot address. Internal borders could be part of a residuary federal power absent any clear fit under other powers. And restrictions on inter-provincial mobility raise problems that cannot be limited to any one province—the impact of limited access to Nova Scotia cannot, for example, be confined to that province—and seem to make questions about interprovincial, cross-border mobility of paradigmatically national concern.⁴

Claims that interprovincial border closures are *intra vires* the provinces’ public health powers have some credibility but cannot sufficiently justify strictly provincial closures. Hoult and Potter’s discussion of *Taylor* is instructive. They read *Taylor* as an apt application of the principle in *R v. Comeau*, whereby “provinces have extensive powers within their jurisdiction, even if their actions have incidental effects on federal heads of power” (Hoult and Potter 2021, 41–42). They believe provinces have broad authority over areas within their jurisdiction that should imply control over borders (*ibid.*, 33). Yet a public health power need not encompass a power over internal borders. Pandemics may require parties work together within their jurisdiction to address shared threats (as a practical matter, if not a strictly constitutional one). But even this reality would not entail that internal borders are or should be part of a provincial public health power.

Precedent may not demand federal involvement in any country’s interprovincial border closures. That is a country-specific query. And, specifically, Canadian doctrine admits good faith disagreement. *Taylor* is good law, albeit from a non-binding trial decision. Section 121 can be limited in the name of public health (though accepted restrictions are often narrow). And other arguments for

³ The *Canada (Ontario Boundary) Act* is in the Schedule of Constitution Documents added to the *Constitution Act, 1982*. A note to section 5 then states:

The Parliament of Canada added portions of the Northwest Territories to the adjoining provinces in 1912 by The Ontario Boundaries Extension Act, S.C. 1912, 2 Geo. V, c. 40, The Quebec Boundaries Extension Act, 1912, 2 Geo. V, c. 45 and The Manitoba Boundaries Extension Act, 1912, 2 Geo. V, c. 32, and further additions were made to Manitoba by The Manitoba Boundaries Extension Act, 1930, 20-21 Geo. V, c. 28.

⁴ For the latest statement of the test for matters of national concern, see (the controversial) *References re Greenhouse Gas Pollution Pricing Act. Munro v National Capital Commission* is a classic case of federal projects being able to cross internal borders, though in an expropriation setting.

provincial control are available. Recent case law (e.g., *Murray-Hall v. Quebec (Attorney General)*) suggests the concept of a provincial residuary power over local or private affairs (e.g., Lysyk 1979) remains alive in Canadian constitutional doctrine. Border restrictions could instead fit there absent clear fit under another head of power.⁵

I take no definitive stand on those issues here but simply note that existing doctrinal sources cannot clearly resolve the jurisdictional disputes. Absent doctrinal clarity, as in Canada, more analysis is needed. Satisfactory responses to questions about relevant authority likely must appeal to external considerations, though many will challenge strictly provincial powers below.

2. Empirical Considerations

It is tempting to appeal to outcomes to resolve whether strictly provincial closures are legitimate, but the record on pandemic-related interprovincial border closures is inconclusive. It is, first, questionable whether empirics alone can resolve *any* jurisdictional question. Questions about the allocation of final decision-making authority implicate values that do not easily submit to brute metrics; people reasonably disagree about what metrics should even try to measure. The record on COVID-19 and federalism then suggests empirical resolution will prove inadequate even if everyone agrees on a plausible set of metrics. Even the best collections admit limitations.⁶ Outcomes across federal states vary. Clear indications of what aspects of federal design, if any, consistently contribute to particular outcomes are hard to identify (e.g., Vampa 2021). Few detail whether and how choices about who makes what decisions impact outcomes. Data on levels of governmental cooperation is also incomplete and varied (Schnabel and Hegele 2021, 538). Absent data from other pandemics, empirics alone are unlikely to resolve *any* authority allocation disputes.

Conflicting interpretations of the best available data also belie attempts to address the problem empirically, even as they provide touchstones for theoretical analyses. For instance, COVID-19 impacted many federal countries' constituent parts in different degrees. In the first wave, eleven of the fifteen highest mortality rates and overall number of fatalities were in federations (Steytler 2022a, 2) but each had at least one province with higher rates of infection, hospitalizations, and deaths "than other regions in the same federation" (Hegele 2022). Larger federations may have faced greater variance (Steytler 2022b, 398) but different outcomes occurred in smaller ones too (Hegele 2022). Some suggest particular provincial interventions safeguarded provincial populations, thereby demonstrating the benefits of decentralization of relevant authority. Others believe that many countries' problems were attributable to provincial failures or a lack of standardization that left some more

⁵ I thank an anonymous reviewer for this suggestion.

⁶ E.g., *Comparative Federalism and Covid-19: Combating the Pandemic* (Routledge, 2022) and the special issue of *Publius* cited below focus on the first wave. The former does not compare the performance of federal and non-federal states (Steytler 2022a, 5). The latter offers a varied account of federalism's impact.

vulnerable than others.⁷ One's reading of the record will likely depend on one's values, though the common record can help guide value-based analyses.

Similarly, many federations provide provinces with primary authority over and responsibility for healthcare (e.g., Steyler 2022b, 400). But federal governments' role in pandemic management also varied. Once COVID-19 moved beyond cities,⁸ many countries had initially strong federal interventions in areas of concurrent jurisdiction, followed by gradual devolution (Hegele 2022). Some suggest federations "resorted to states of emergency and derogations from the constitutional order less frequently than non-federal states" (Palermo 2022, xvii–xviii), though I am unaware of precise numbers. Other federations continued to leave the bulk of substantive decision-making to provinces (Cigler 2021). Scholars disagree about the extent to which federal governments "led" even in particular case examples. It is thus unsurprising that there is as yet no general explanation of why particular provinces faced different outcomes that could provide strictly empirical solutions here. And there are those who debate whether differential outcomes were acceptable. Some suggest that different outcomes in the United States (Cigler 2021) and Canada (Da Silva and St.-Hilaire 2021) could have been minimized if federal governments in those countries used their existing constitutional powers, possibly including emergency powers, to better standardize policies. They will question claims that evidence of a lack of emergency power use demonstrates "the very essence of federalism and what it is for: a better, more nuanced, more pondered, and more democratic way to make decisions ... [or that] a multi-level structure helps correct fatal mistakes made by national governments" (Palermo 2022, xvii–xviii). Provinces clearly filled gaps in seemingly problematically laissez-faire federal responses in some countries (e.g., the United States, Brazil). However, debates about overall performance remain good faith disputes without clear resolutions. It accordingly remains nearly impossible to assess whether federalism aided or hindered "good" outcomes absent a theory of federalism's purpose(s).

The level and success of intergovernmental arrangements also varied. Such arrangements often did not operate as intended. For instance, Montgomery et al. (2022) note that the United Kingdom and United States had some of the most well-developed pandemic management plans pre-COVID and yet did not follow them in practice, partly due to a lack of incentives for parties to act as intended.⁹ Moreover, pre-existing intergovernmental fora in several countries were bypassed in favour of new bodies.¹⁰

The Canadian experience reflects some of the concerns noted above and adds wrinkles. Parts of Canada experienced more serious consequences than others. Quebec, for example, faced higher infection and mortality rates than the Atlantic provinces (Poirier and Michelin 2022, 200). Canada also experienced debates on

⁷ Highly varied outcomes did not persist in later waves, further complicating matters.

⁸ Many cities were "first movers" in the COVID-19 policy development (Steyler 2022b, 403, 411).

⁹ See also Cigler (2021). But compare Steyler (2022b, 400) (attributing issues in the United States to earlier funding cuts).

¹⁰ See also Saunders (2022, 388 (agreeing while also noting some defunct bodies' reconstitution for COVID-19)).

whether existing plans for pandemic management were followed during COVID-19. It is often considered an outlier in consistently avoiding centralization during COVID-19 (Steytler 2022b, 416–417). Some considered provinces' abilities to set their own policies beneficial: it permitted policy variations reflecting local needs or values (e.g., *ibid.*; Saunders 2022, 392–393).¹¹ Differential outcomes are, they claim, to be celebrated where the Atlantic provinces, for example, were able to leverage local rules to minimize impact. Canada is then considered a success story in federal pandemic management. Others suggest minimalist federal responses led to unnecessary deviations in outcomes and undermined proper coordination (e.g., Attaran and Houston 2020) while leaving provincial governments “on the hook” for making politically difficult decisions (e.g., Da Silva and St-Hilaire 2021). The federal government funded many relief programs and transferred funds to the provinces to run further programs, sent personnel to provincial long-term care homes and remote Indigenous communities, and issued regulations and guidance frameworks on many matters (Poirier and Michelin 2022, 209). But skeptics (e.g., Attaran and Houston 2020; Da Silva and St-Hilaire 2021) suggest the federal government could have done more, such as setting uniform standards on what data to collect from those presenting with COVID symptoms or when to vaccinate populations. Such action could, they suggest, have minimized bad outcomes nationally. Interprovincial deviations in outcomes appear worrisome if they can be attributed to inaction that produces worse outcomes cross-nationally.

Canadian intergovernmental relations also foster debate. Many identify Canada as a success for intergovernmental relations, noting frequent meetings between leaders and the way in which parties did not stand in each other's way (Poirier and Michelin 2022; Hegele 2022; Steytler 2022b, 402). The federal employees Hoult and Potter (2021, 32) suggest COVID-19 “triggered unprecedented (albeit imperfect) levels of coordination between the provincial, territorial and federal governments, bringing to the forefront the extent to which our federation is adaptable in the face of a major crisis.” Federal and provincial governments appeared to regularly communicate and coordinated some responses during COVID-19. However, those who celebrate Canadian intergovernmental relations tend to also support decentralization (Steytler 2022b; Poirier and Michelin 2022; Saunders 2022). More skeptical scholars (Attaran and Houston 2020; Da Silva and St. Hilaire 2021) suggest provinces acting free from impediments can be undesirable. They highlight a lack of clarity on who was to do what in Canada during COVID-19's multiple waves.

Even those who view COVID-era Canadian intergovernmental arrangements positively admit that the specifics of intergovernmental agreements remained a “black box” to the public (Poirier and Michelin 2022; Saunders 2022). Skeptics believe minimal federal action meant many seemingly inter-governmental measures were primarily provincial, again suggesting the federal government essentially took a spending, rather than coordinating, role. The lack of uniform standards on what data to collect when is notable in this respect (Attaran and Houston 2020;

¹¹ Poirier and Michelin (2022, 214) present an excellent, more nuanced take on alternatives.

Da Silva and St. Hilaire 2021). If federations invoked emergency powers less frequently, the extent to which deviations from constitutional norms occurred is unclear. Courts did not consistently challenge actions that may have deviated from constitutional norms. One overview of the comparative data suggests courts were more deferential to federal governments than provincial ones but let many provinces take “egregious” actions, including “border restrictions beyond their competence” (Steytler 2022b, 411). Many possible problems likely did not even make it to court.

Doctrinal and empirical considerations ultimately provide minimal insight into whether, how, why, or when interprovincial border closures are justified. Plausible guidance is often only compelling when paired with particular understandings of what federal governance should achieve. This raises our puzzle: *Should* provinces be able to close borders in federal entities? Absent clear, consistent empirical or doctrinal guidance, I turn to theory for better responses.

III. The Ends of Federalism as a Guide

Federalism can be supported by several considerations and adopted for several ends.¹² It may, for instance, be justified by efficiency concerns: federalism can help sort persons into jurisdictions where they can most efficiently pursue their interests (Tiebout 1956). Dividing territory into set jurisdictions with distinct powers also enables persons to “vote with their feet” and move to jurisdictions adopting policies they prefer (Somin 2020). Distinct provincial jurisdiction may also foster policy experimentation (e.g., Robson 2021 (also surveying limits to experimental claims)) or innovation (e.g., Tarr 2001). Provinces with distinct powers can test new ideas and copy what works elsewhere. Given the possibility of “foot voting,” governments should be incentivized to regulate in more effective ways. Federalism may also provide persons with a greater vote-share in or more meaningful locus for democratic decision-making (Weinstock 2001). It could, for instance, help ensure persons most affected by or relevantly subject to laws play roles in shaping them. Federalism could also promote and sustain diversity (Bednar 2008) or pluralism (Poirier 2015) in a polity, and a division of powers among parties could provide a “bulwark” against centralized authority (Levy 2007), plausibly protecting democratic interests against tyranny (*ibid.*; Weinstock 2001; Bednar 2008). Or it could be justified to protect minority or internal self-determination-rights (e.g., Kymlicka 2001; Norman 2006). Such ends are not mutually exclusive. Concerns with liberty can, for instance, serve as standalone justifications for federalism (Weinstock 2001) *and* support foot voting (Somin 2020). Yet treating them as distinct provides a broader range of possible justifications for particular divisions of powers, including over interprovincial border closures.

Other theories suggest federalism is fundamentally pluralistic in the sense that federalism seeks to balance interests. One prominent approach defines it as

¹² This summary includes normative ends from Da Silva (2022) and Hegele and Schnabel (2021, 1054–1055), as well as a complementary list of ends from the COVID-19 and federalism literature covering similar ground.

combining shared-rule and self-rule (Føllesdal 2003/2018; Watts 2008). Another suggests federalism seeks to balance the benefits of small and large governance (Diamond 1973). Underlying concerns are elsewhere discussed in terms of a balance between unity and diversity or autonomy and participation (e.g., Fleiner and Gaudreault-DesBiens 2012; Poirier 2015). These accounts differ, but each suggests federalism requires a balance between interests applying to a whole country and those best furthered at more local levels. This can present trade-offs between, for example, the effectiveness of uniform central governance and the policy experimentation fostered by provincial rule (Hegele and Schnabel 2021, 1054–1055). However, federalism can provide a structure for making acceptable trade-offs.

Potential justifications for federalism all assume there can be a division of powers between authorities in a state consistent with the state's long-term existence. Federalism is taken to be possible in a country and provide a form of governance distinct from international or regional rule. All assume federalism can further some desirable ends. This should also constrain possible allocations of decision-making powers within federations. If, for instance, federalism is justified by liberty interests, decentralization within federal states should further individual liberty, all else being equal. This places a basic effectiveness condition on any authority allocation regardless of which justificatory tack one may take. A unit claiming authority over a given subject must have the capacity to govern in a manner that will further justificatory ends.¹³

IV. The Case for Provincial Restrictions on Interprovincial Mobility

The strongest arguments for permitting restrictions on interprovincial mobility appeal to desirable outcomes, liberties of those within the jurisdiction, justifiable policy experimentation or local concerns, or appropriate balancing of competing considerations. The first plausible argument simply notes that, for example, provinces in the Atlantic Bubble and the country of Australia initially experienced less severe impacts from COVID-19 than close comparators. Such brute facts suggest consequential reasoning can help to vindicate at least some closures. The second argument builds on this to note that persons in those jurisdictions faced less severe restrictions on their rights within that territory than those in comparable jurisdictions. The Atlantic provinces had shorter, more targeted lockdown measures than Quebec, Ontario, and other Canadian provinces, at least during the first wave (sources above). And Australia had less severe restrictions generally than Canada or the United States (albeit not New Zealand). While Australia's outcomes were likely also due to strong international restrictions, this claim has some merit.

The third argument suggests provinces can or should be able to experiment with different measures under their health policymaking, either as a general function of their authority or to reflect local preferences. Where empirics remain mixed, there may still be reason to try border closures to build a better evidence base

¹³ See also Saunders (2022, 382–383) on capacity-based arguments for centralization during pandemics.

for policy experimentation. After all, it is hard to know whether mask or vaccine mandates “work” without policy differences. The same could potentially be said of interprovincial border closures. Given empirical uncertainty, one can also plausibly assert that closures are a reasonable choice if adopted to reflect local preferences.

The related fourth argument holds that permitting border closures could strike the appropriate balance between a need for central decision-making and more local concerns. If provincial standards meet some minimal standard, variation is desirable under various interpretations of the ends of federalism. This approach may require more central coordination in Canada or Australia to strike the appropriate balance. Murphy and Arban (2021) accordingly fault Australian state governments for not coordinating with the federal government in their closures. In Canada, Houlton and Potter (2021, 32–33) even proposed an arm’s-length commission to provide “an interdelegation framework for better coordinating federal–provincial–territorial ... powers with respect to border controls during” pandemics. Yet the basic idea that closures could foster a desirable mix of centrally coordinated standards and permissible variation has some plausibility.

The third and fourth arguments are plausibly consonant with a principle of subsidiarity understood as providing provinces with a presumptive claim to authority over all matters that they can address on their own. While I elsewhere question whether subsidiarity can guide authority allocation (Da Silva 2023), subsidiarity’s proponents could suggest the many interests in local decision-making undergirding that principle support provincial decision-making here.¹⁴

V. The Case Against Strictly Provincial Restrictions on Interprovincial Mobility

These arguments cannot, however, ultimately vindicate *strictly provincial* authority to close interprovincial borders during a pandemic, let alone generally. Additional considerations make such closures less plausible still. Adequate responses to pandemics require constitutional design that will fulfill at least one of federalism’s intended ends of federalism. Successful design should incentivize federal parties to play their intended role in the system and help fulfill the end(s). That role is partially defined by constitutional texts: actors should not act outside their defined constitutional authority. Strictly provincial mobility restrictions often undermine purported ends of federalism or strike implausible balances between underlying values, and provinces lack clear authority to close borders anyway. Any necessary closures should have explicit federal input.

There may be reasons for closures and some differential outcomes are acceptable—the Atlantic Bubble helped safeguard its residents in the short term—but closures by provinces alone can exacerbate conditions that produce problematic inequalities in the long term. This undermines even the best, outcome-based argument for permitting strictly provincial decision-making. Provincial control over border closures supports an incentive structure that is likely to lead to federal inaction and closures persisting even after any purported justification dissipates.

¹⁴ I thank an anonymous reviewer for raising this point.

Leaving decisions about border closures to the provinces permits federal governments to again avoid a plausibly desirable coordinating role and can present incentives to provincial governments to keep measures in place beyond the point of strict necessity. If a bubble “works” by providing lower case counts, etc. in one region than another, persons in the bubble may look at comparative outcomes and be less willing to challenge any mobility restrictions’ “necessity.” Where, in turn, reopening interprovincial borders presents epidemiological risks, attendant political costs could make parties reluctant to open borders. Provincial governments are only accountable to their residents, so the good of those beyond their borders need not play a role in their rational calculus. Safeguarding comparatively “light” internal restrictions that are politically beneficial in local settings at the expense of non-resident rights is rational in these circumstances, even when interprovincial measures are no longer epidemiologically required. Federal governments who require significant vote-shares from provinces will, in turn, be reluctant to do anything that would undermine politically popular closures, even where they have authority to do so. The length of the Atlantic Bubble is accordingly notable, even if initial adoption was fully justified.

Federal involvement in decisions about border closures, then, appears desirable even where internal border closures are necessary. Absent some federal involvement, there will be too few limits on provincial actions, and it will be too easy for federal governments to ignore their responsibility to residents therein. The incentive structure above suggests provincial actors alone will too easily act outside the boundaries of any justification for closures that may apply. The lack of explicit federal involvement in Canadian closures and Australian state consultation with their federal government is notable in this respect. Federal parties may not play proper coordinating roles if provinces are understood as being able to act without their involvement. One cannot always rely on courts such as those in Argentina to ensure proper boundary drawing. If provinces have distinct authority to close borders, they plausibly do not need to exercise it in tandem with others as a strict matter of constitutional law. Canadian constitutional law, specifically, does not, for instance, require that any party cooperate with others in the exercise of its exclusive powers. But this does not undermine the moral case for federal involvement in interprovincial border closure decisions there or elsewhere—and could even bolster support for exclusively federal authority in jurisdictions where proper coordination cannot be assumed.

Leaving interprovincial border questions to provinces also risks creating cleavages that do not strictly follow epidemiological guidelines. If we grant provincial authority over internal borders, it is not obvious that such powers need to be confined to epidemiological emergencies. Absent some limiting principle, financial disputes may suffice. That hardly seems desirable.¹⁵ Even a narrow public health emergency-specific provincial power may not produce closures fit for the closures’

¹⁵ Section 121 of Canada’s *Constitution Act 1867*, again, provides some limited opportunities for “unilateral” trade restrictions but these narrowly defined opportunities do not traditionally provide general authority to close borders to other provinces. I also thank an anonymous reviewer for raising this point.

intended purpose. Provinces alone may be more likely to permit access to residents of provinces who are pre-existing allies or share other ties. The Atlantic Bubble (at least initially) followed epidemiological boundaries, so this concern may not have been realized in COVID-era Canada. But the Bubble also notably followed traditional boundaries of a region that often worked together pre-pandemic. The possibility of fractured patterns among historical partners should not be taken lightly looking forward. Absent some overview body to ensure that restrictions follow proper boundaries necessary to minimize disease, it is probable that at least some boundaries will be drawn politically or historically. Whether particular federal governments are less likely to set boundaries in ways that are epidemiologically sound may vary from country to country and government to government. But federal accountability to a wider voter-base can incentivize proper oversight where federal action is expected, and such a body should provide oversight given its constitutive purposes of fostering a national identity and addressing matters of national concern. The political economy disincentivizing federal action above does not apply where the voter-base expects the federal government to act. They may prove especially well-placed to act.

Another problem with strictly provincial powers is conceptual. Interprovincial mobility appears necessary to distinguish federal entities from international or regional ones, bolstering the claim that provincial control is undesirable. If provinces possess powers to close their borders at will, they do not differ from standalone unitary states along a relevant dimension. Permitting closures by provinces alone comes dangerously close to permitting an outdated view of federal states as compacts of sovereign entities who can revoke full participation at will. While provinces are “sovereign” in their areas of jurisdiction in federal states, treating them as sovereign over borders treats them as closer to standalone states, not parts of a whole. Citizens of each province do not enjoy full access to the federation under this view since other provinces can revoke access rights. Insofar as permitting these restrictions makes a country like Canada look more like the European Union than the United States, it appears to give up on key federal commitments. Being able to freely move across provincial borders is part of what it means to have a federal country, rather than a compact of states.

Strictly provincial border closures can also undermine the countrywide solidarity necessary to long-term state stability. Border closures are a strong statement that one views one’s territory as distinct from others within the same country in an important way. This alone can undermine solidarity. Closures can also be viewed as connoting a lack of concern, which can further undermine solidarity. If, for instance, residents of one province believe other provinces are “going it alone” at a time of crisis, they may understandably feel that their own concerns are not being properly considered. Even advocates for Australian interprovincial border closures note that they undermined countrywide solidarity and suggest that coordination with the federal government would have been ideal to foster solidarity and minimize legitimacy concerns (Murphy and Arban 2021, 628, 641).

Concerns about federal ends further challenge unilateral provincial closures. COVID-19 offered a mixed empirical record on policy experimentation or ability to tailor responses to reflect local concerns. Murphy and Arban (2021, 633) note that

policy differences across federal units during the first wave did not always track epidemiological differences. They note, for instance, different rules on fishing licences, public pool access and masks, and curfews as well as differences in regional travel rules that are not strictly epidemiological. These are signs of policy preference differences guiding provincial politics. Murphy and Arban (2021, 634) view cross-provincial differences as signs of competition between provinces and experimentation, with indications that masks worked and curfews did not, for example, providing guidance on what other provinces may adopt. However, provinces without proper resources were unable to address concerns elsewhere (Saunders 2022, 383–383), and scholars suggest federal and state governments of the United States lacked any coherent theory of federalism, leading to something of a policy free-for-all (Birkland et al. 2021). This mix of factors does not provide a clear read on whether decentralization fosters desirable experimentation during pandemics. And many forms of desirable experimentation are consistent with borders remaining open. Decentralization can undermine necessary countrywide responses to threats. Even if decentralization in general fosters desirable experimentation or provide more tailored policies, that may not favour border closures. We were able to discover the relative merits of mask or vaccination policies above absent strict internal border closures. The kind of “natural experiments” fostered by federalism has not required strict separation of populations with no cross-border travel in any setting, pandemic or otherwise, to date. To the extent that some study control necessitating clear separation is required in the future, it will be under very different circumstances than those seen to date. That case will likely be an empirical one.

Interprovincial border closures actually undermine the kind of preference sorting that makes distinct concerns more salient. Neither foot voting nor other forms of movement that would permit Tiebout sorting are possible under border closure conditions. If differential responses producing differential outcomes is acceptable, persons should be able to benefit from them. If they are justified by appeals to reasonable disagreement, the need to permit people to benefit from what they take to be the better approach is still more acute. Border closures keep people within defined locations subject to norms they may not favour. This undermines any claimed diversity value: persons cannot enjoy the fruits of diverse decision-making procedures. Murphy and Arban (2021, 634) suggest that concerns about residents’ lack of a right of “exit” from jurisdictions whose policies they find undesirable can be minimized via “other modes of accountability,” such as “public comment, media coverage, and elections.” However, such mechanisms do not clearly properly match policy preferences or enable persons to move to internal jurisdictions striking what they view to be a more appropriate balance of interests. Concerns with experimentation and policy matching accordingly do not support these closures.

Liberty considerations likewise ultimately undermine, rather than support, strictly provincial border closures. Let us grant that persons within closed interstate borders faced less frequent and severe lockdowns than those outside them. Further grant that containing a pandemic can provide good conditions for exercising one’s liberties. The way in which closures directly impact free movement still must play a role in our policy assessments. Intra-country inequities in liberty are

again problematic. And residents of all locations still faced severe interprovincial movement restrictions. Where these also undermine liberty to live under rules one finds preferable by eliminating the possibility of foot voting, the overall balance of liberty interests seemingly augurs against the adoption of border closures in all but the most limited of circumstances.

At this juncture, concerns with federalism implicate rights-based considerations. While I largely viewed those concerns as orthogonal above, persons have rights to travel within their country. Border closures not only infringe on mobility rights but also limit the scope of persons' other rights such that these can only be enjoyed by others. While I also make no all-things-considered judgments here on whether border closures' infringements of rights qualify as violations thereof, even these basic points should give one pause about the relevant constraints. It is too easy for many to ignore the severe costs that border restrictions can have on persons. The Atlantic Bubble did not permit persons to reunite with family members short-term, even limiting their ability to visit loved ones at the end of life.¹⁶ It thus limited enjoyment of fundamental interests.¹⁷

Pandemic conditions severely restrict rights too, so many restrictions on mobility could prove justifiable on balance. But we must take border closures' impact on a broad array of rights seriously if we are to properly balance the full range of applicable fundamental moral interests. A brief discussion of case law above questions whether courts properly safeguard mobility rights during pandemics. The incentive structure there may limit other actors' ability to do so. Even this *possibility* should lead us to favour conditions under which provinces cannot act alone to close borders and we can expect the federal government to act as a check on any proposals. If federal government involvement is expected, in turn, it will be less politically risky and offer another check on provincial rights infringement beyond judicial checks of hitherto mixed utility.

One may, of course, contend that concerns with preference sorting and liberty speak against *any* interprovincial border closures, including those following federal involvement.¹⁸ Insofar as this is true, it bolsters a case against strictly provincial closures. The deficiencies in the policy experimentation-based argument are particularly notable since they seem best tailored to permitting differences. If even the best case for provincial autonomy cannot justify strictly provincial closures, it is unlikely that anything can. It is, however, worth noting that even if these arguments cannot justify any closures this does not mean closures are unjustified in all circumstances. Other considerations, including empirical ones, may sometimes

¹⁶ This problem was not unique to the context at issue. Hospitals and other facilities also restricted access to patients near the end of life. However interprovincial border closures provided an additional hurdle to reunification there. Such closures also caused persons to miss other significant (and non-medical) milestones in their loved ones' lives.

¹⁷ A full examination of liberty interests in Canada should appeal to jurisprudence under section 6 of the *Charter*. As an anonymous reviewer rightly notes, mobility rights have received a restricted reading to date. This arguably provides for greater authority power to limit inter-provincial movement than I would desire. However, this would seem to favour addressing such matters in division of powers cases. My proposal provides another place to protect fundamental life interests that have not yet been clearly recognized as components of constitutional human rights.

¹⁸ I also thank an anonymous reviewer for making this point explicit.

warrant closures. Federal involvement appears desirable for reasons outlined above and below. And even experimentation and liberty interests may favour closures involving the federal governments over those that do not. Such a higher-level body could be present to ensure all citizens benefit from successful experiments, either via federal policy or permitting movement across borders. Its interest in persons beyond the confines of any experimental boundaries again appears pertinent.

Subsidiarity is also unlikely to justify strictly provincial closures. Many purported ends of federalism are also offered to justify subsidiarity (Da Silva 2023). If they cannot justify closures on their own, it is hard to see how the word “subsidiarity” can provide additional moral magic. And even if subsidiarity were able to perform such a trick in general circumstances, it cannot do so here. Subsidiarity only provides for a presumption of local decision-making where the local decision-maker is capable of addressing the issue at hand. This does not appear to be such a case.

It is, finally, unclear how still other ends of federalism could justify provincial border closures absent federal agreement. Neither internal self-determination rights nor an interest in avoiding centralized tyranny require provincial control over internal borders. And I am unclear on what a democratic argument would look like here. The preceding then suggests strictly provincial closures more broadly seem to strike a poor balance between the goods of large and small government, diversity and autonomy, etc. Closure arguments seem to tip far on one side of each scale, undermining a purported federal good. For instance, diversity appears much more important than unity in arguments for provincial closures, but many cannot enjoy that diversity.

Conclusion

Finding that closures of interprovincial borders by the provinces alone are undesirable is consistent with multiple approaches on how to move forward. The present work does not seek to provide a strong argument for other approaches to any necessary closures, which may be desirable and justified by epidemiological considerations. It suffices to note that any plausible view will require greater federal involvement in closure decisions than occurred in the Bubble.¹⁹

On balance, the preceding supports federal control over interprovincial border closures. I suspect federal governments should hold ultimate authority to close interprovincial borders, but any such power should plausibly only be invoked in consultation with provinces. Provinces have unique knowledge of local circumstances and values that should inform any federal decisions. And a lack of consultation could be destabilizing. Alternatively, one could conclude that provinces can limit borders on public health grounds but those should be exercised with greater federal involvement in closures than seen previously. If, in short, a public health power includes a power to close borders under set circumstances, there

¹⁹ Important questions about, for example, the role of Indigenous peoples in this process remain. They are outside the scope of this inquiry. But see Feltes, Stacey and the Tsilhqot'in National Government (2023) for one approach to the primacy of Indigenous involvement in this area.

should be an expectation that it will only be exercised in consultation with the federal government. The forgoing also promotes mechanisms to ensure such input in cases where doctrine already grants provincial powers. Hoult and Potter's (2021) suggestion appears plausible where provincial powers exist in law; it provides a mechanism through which other parties are expected to raise relevant concerns. Expectations that governments will only close borders after consulting others could, in fact, trigger expectations that each will "check" the others, minimizing concerns that parties will act outside the boundaries of their powers or unduly limit rights. Federal involvement has its own issues and may fit poorly with the constitutional doctrine of particular states. But there is now moral reason to question strictly provincial decisions to close internal borders. Federal involvement is desirable.

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