administering those lands within the Act's directives. We affirm the district court's grant of summary judgment in favor of the United States and Soda Mountain.

AFFIRMED.

TALLMAN, Circuit Judge, concurring in part and dissenting in part:

I

I agree that we may review claims that the President's execution of one statute obstructs the operation of another. However, I must respectfully dissent from the majority's conclusion that Proclamation 9564 does not conflict with the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O&C Act).

II

This case arises from the protracted history of controversial land use decisions that have decimated Pacific Northwest timber communities long dependent on logging and wood product sales to sustain them. The management of these vast swaths of federal land, removed from state and local tax rolls, has had a checkered history to say the least, but also a devastating economic impact on these towns. The President's unilateral action here favoring environmental conservation interests is the latest skirmish.

Two small Oregon timber companies, Murphy Timber Company and Murphy Timber Investments, LLC (collectively Murphy Co.) own land that is impacted by adjacent federal timberland. In 1937 Congress enacted the O&C Act and directed the Secretary of the Interior

(Secretary) to manage those federal timberlands primarily for "permanent forest production . . . in conformity with the principal [sic] of sustained yield." 43 U.S.C. § 2601. In 2017 President Obama issued a proclamation pursuant to the Antiquities Act which doubled the size of a preexisting national monument, created by President Clinton, to cover O&C timberlands. Proclamation 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017). The Proclamation directs the Secretary to manage lands "under the same laws and regulations that apply to the rest of the monument," 82 Fed. Reg. at 6149, which absolutely prohibit sustained yield calculation and "[t]he commercial harvest of timber" within the monument. Proclamation 7318, 65 Fed. Reg. 37249, 37250 (June 9, 2000).

The question we face is whether the President, through an Antiquities Act proclamation, may direct a subordinate to disregard duties prescribed by another act of Congress. We should hold that "[t]he President cannot authorize a secretary . . . to omit the performance of those duties which are enjoined by law." *Marbury v. Madison*, 5 U.S. 137, 138-39, 154, 158 (1803) (summarizing and endorsing arguments of counsel).

III

The majority opens with a sterile analysis of whether the O&C Act repealed the Antiquities Act. But whether the Antiquities Act and the O&C Act can coexist in the abstract is quite beside the point. Rather, we must decide whether Proclamation 9564—issued pursuant to the Antiquities Act—conflicts with the O&C Act. Even a perfunctory review of the plain text of the Proclamation and the O&C Act reveals an obvious conflict.

The Antiquities Act permits the President, in his "discretion, [to] declare by public proclamation historic landmarks . . . situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301. The parcels of the monument that the President may reserve must "be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.*

Enacted three decades after the Antiquities Act, the O&C Act mandates that O&C timberlands "*shall* be managed" by the Secretary "for permanent forest production, and the timber thereon *shall* be sold, cut, and removed in conformity with the principal [sic] of sustained yield." 43 U.S.C. § 2601 (emphasis added). In calculating sustained yield, the Secretary must consider the following statutory goals: "providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilties [sic]." *Id.* The O&C Act's *non-obstante* clause, which the majority dismisses as too vague to mean anything here, expressly provides: "All Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act." O&C Act, Pub. L. No. 75-405, § 5, 50 Stat. 874, 875 (1937).

Proclamation 9564 doubles the existing Cascade-Siskiyou National Monument to cover O&C timberlands, and it directs the Secretary to manage those lands under "laws and regulations," 82 Fed. Reg. at 6149, that outright prohibit "the commercial harvest of timber" and the "calculation or provision of a sustained yield of timber" on all lands falling within the monument. 65 Fed. Reg. at

37250. This removes the land entirely from inclusion as available timberlands to meet statutory commands.

The conflict between the O&C Act and Proclamation 9564 could not be more self-evident. The O&C Act requires sustained yield calculation for all O&C timberlands. Proclamation 9564 removes O&C timberlands from the sustained yield calculation if they fall within the monument. Although the Antiquities Act does grant the President broad authority to establish national monuments, nowhere does it remotely purport to grant him authority to suspend the operation of another act of Congress. By expressly singling out sustained yield calculation for prohibition, the President's proclamation intentionally directs the Secretary to disregard her statutory duties under the O&C Act to make sure that timber is available for harvest to meet the economic needs of timber-dependent communities.

The Secretary's duty to conduct a sustained yield analysis for all O&C timberland "is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued." *Marbury*, 5 U.S. at 158. The Secretary must "conform to the law, and in this [s]he is an officer of the United States, bound to obey the laws." *Id.* She acts "under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose." *Id.* And the President must "take Care that the Laws be *faithfully* executed." U.S. CONST. art II, § 3 (emphasis added).

Accordingly, the "judicial inquiry is complete" and "our job is at an end." *Connecticut Nat.'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449

U.S. 424, 430 (1981)); *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1749 (2020). We may not rewrite statutes or executive orders to avoid clear conflict, and the only task that remains is to give effect to the plain meaning of the O&C Act and declare the Proclamation void as to O&C timberland.

Other principles of construction require us to give effect to the O&C Act over Proclamation 9564. Under the canon of *generalia specialibus non derogant*, "a 'narrow, precise, and specific' statutory provision is not overridden by another provision 'covering a more generalized spectrum' of issues." *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976)). We "assume Congress intended specific provisions to prevail over more general ones." *Id.* As Judge Richard Leon correctly observed in *American Forest Resource Council v. Hammond*, "[t]he Antiquities Act says nothing specific about managing O&C timberland. As such, it cannot be understood to nullify the timber harvest mandates imposed by Congress in the O&C Act." 422 F. Supp. 3d 184, 193 (D.D.C. 2019) (citations omitted). An executive proclamation issued pursuant to a general grant of authority cannot supersede a specific act of Congress.

Furthermore, later-in-time statutes generally take priority over earlier-enacted laws. *See Bell v. United States*, 366 U.S. 393, 407-08 (1961). The Antiquities Act, and any execution of it, must yield to the O&C Act because Congress enacted the O&C Act intending that it have "full force and effect" notwithstanding the existence of the Antiquities Act. O&C Act, § 5, 50 Stat. 875. But where an act is *both* later in time *and* more specific, the "specific policy embodied in a later federal statute should control our construction of the [earlier] statute." *Food & Drug Admin. v. Brown &*

Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530 (1998)).[1] As the later-in-time statute specifically addressing the management of O&C lands to provide sustainable timber, the O&C Act supersedes the Antiquities Act and any ensuing proclamation.

The majority appears to have fashioned its own rule that where Congress wishes to restrict the President's Antiquities Act authority, it must do so expressly. The majority cites instances where Congress has enacted legislation rebuking exercises of the Antiquities Act in Wyoming and Alaska, concluding that "Congress would speak as clearly and promptly here" if it felt the President had overstepped his authority. This argument belies foundational principles of constitutional law and misconstrues the role of courts in our tripartite system of government.

The Judiciary may not abdicate its duty to curtail unlawful executive action merely because Congress may also act to restrain the President, THE FEDERALIST NO. 78 (Alexander Hamilton) (explaining constitutional limits "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void"), and citizens need not await congressional action before seeking relief from unlawful executive action in the courts. *Id.* ("There is no position which depends on clearer

[1] For similar reasons, the majority's reference to Congress's vague delegation of authority to the Secretary of Defense to "utilize excess property" at closed military bases is inapposite. 10 U.S.C. § 2687 note § 2905(b)(1)(A) (Defense Base Closure and Realignment Act of 1990). *See also id.* at § 2905(b)(1)(D) (also delegating authority to the Secretary of Defense to "determine the availability of excess or surplus real property for wildlife conservation purposes").

principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. . . . To deny this, would be to affirm . . . that the representatives of the people are superior to the people themselves . . . .").

"The danger of imputing to Congress, as a result of its failure to take positive or affirmative action through normal legislative processes, ideas entertained by the [majority] concerning Congress' will" is well known to courts. *Cleveland v. United States*, 329 U.S. 14, 23 (1946) (Rutledge, J., concurring). "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981). For those reasons, "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983). And "[u]nder the *Youngstown* tripartite framework, congressional acquiescence is pertinent when the President's action falls within the second category—that is, when he 'acts in absence of either a congressional grant or denial of authority.'" *Medellin v. Texas*, 552 U.S. 491, 528 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). In other words, "[a]n inference drawn from congressional silence certainly cannot be credited when it is contrary to" the text of the O&C Act. *Burns v. United States*, 501 U.S. 129, 136 (1991). Moreover, even an affirmative act of Congress cannot grant the President the power to indefinitely modify or nullify duly enacted law. *See Clinton v. City of New York*, 524 U.S. 417, 436-47 (1998). The majority's deference to the political

branches of government in this case is contrary to our commitment to the rule of law.

Indeed, the far-reaching implications of the majority's interpretive rule are sobering: every federal land management law that does not expressly shield itself from the Antiquities Act is now subject to executive nullification by proclamation. I can find no limiting principle within the majority opinion that counsels otherwise. I think it manifestly more sensible to apply a different presumption: I would not construe a statute to grant the President unfettered authority to indefinitely suspend or cancel the operation of federal law, *see id.* at 443-44 (distinguishing between constitutional delegations of authority to suspend statutes and unconstitutional delegations of authority to cancel statutes), particularly where Congress has not expressly done so nor conditioned the suspension authority upon some intelligible changed circumstance. *See, e.g.*, 46 U.S.C. § 3101 ("When the President decides that the needs of foreign commerce require, *the President may suspend* a provision of this part . . . ." (emphasis added)); 46 U.S.C. § 60304 ("If the President is satisfied that the government of a foreign country does not impose discriminating or countervailing duties to the disadvantage of the United States, *the President shall suspend* the imposition of special tonnage taxes and light money . . . ." (emphasis added)); 22 U.S.C. § 4103 ("The President *may by Executive order suspend* any provision of this subchapter . . . if the President determines in writing that the suspension is necessary in the interest of national security because of an emergency." (emphasis added)).

A few simple counterfactuals illustrate the infirmity of the majority's position. As the majority notes, the year the O&C Act was enacted, President Franklin Delano Roosevelt

exercised his Antiquities Act authority several times. Suppose, for the sake of argument, President Roosevelt had been opposed to logging and the O&C Act had been adopted over his veto. According to the majority, President Roosevelt could have lawfully obstructed the clear will of Congress by issuing an Antiquities Act proclamation prohibiting sustained yield logging on some or all of the timberland the very next day.

Suppose a President wishes to protect Crater Lake National Park from the harmful effects of park visitors. Under federal law, the "National Park shall be open, under such regulations as the Secretary of the Interior may prescribe, to all scientists, excursionists, and pleasure seekers." 16 U.S.C. § 123. According to the majority, however, the President can prohibit visitors by issuing an Antiquities Act proclamation reclassifying the park as a national monument. I cannot agree that Congress intended to cede this unbridled power to the President when it enacted the Antiquities Act.

By permitting Proclamation 9564 to supplant the O&C Act, the majority has transmuted the Antiquities Act into a coiled timber rattler poised to strike at any land management law that the President dislikes.

IV

Notwithstanding the undeniable conflict between Proclamation 9564 and the O&C Act, the majority concludes they can be reconciled because the O&C Act "delegated ample discretion to the Department of the Interior to manage the lands in a flexible manner." But it is unclear how the mere grant of discretion as to how a sustained yield analysis should be conducted can justify the President's total prohibition on even engaging in a sustained yield analysis in

the first place by removing O&C timberlands from the calculation.

The majority first argues that the O&C Act and the Proclamation are reconcilable because the Secretary has unfettered discretion to classify or declassify O&C land as timberland. This proposition is dubious at best. First, interpreting the O&C Act to vest the Secretary with unfettered discretion to declassify O&C timberland runs afoul of the Constitution's requirement that "an 'intelligible principle' [must] guide the delegee's exercise of authority." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019). Given the O&C Act incorporated O&C lands "heretofore" and "hereafter" classified as timberlands, rather than grant the Secretary unbounded discretion, it seems more likely that Congress intended for the Secretary to classify O&C land consistent with past practice, meaning "lands bearing a growth of timber not less than three hundred thousand" board feet per 40 acres. Chamberlain-Ferris Act, Pub. L. No. 86, ch. 137, § 2, 39 Stat. 218, 219 (1916); *see also Bilski v. Kappos*, 561 U.S. 593, 647 (2010) (explaining "an ambiguity in a later-in-time statute must be understood in light of the earlier-in-time framework against which the ambiguous statute was passed").

Second, even assuming the Secretary possesses fiat authority to declassify the O&C timberlands at issue, the government has not directed us to a rulemaking by the Secretary actually doing so. Since Murphy Co. has made clear that its suit pertains only to O&C lands that the Secretary has heretofore classified as timberlands, the Secretary's supposed authority remains unexercised and is therefore irrelevant to this appeal.

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Although conceding that the dominant use for O&C timberlands is timber production to sustain struggling timber communities, the majority next argues that the Proclamation is justified because the Secretary has discretion to consider the additional goals of "protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties" when conducting a sustained yield analysis. 43 U.S.C. § 2601. But Proclamation 9564 is not an exercise of the Secretary's discretion; it is a presidential command. The command does not itself direct the Secretary to exercise her discretion in a certain manner, but rather it restricts her from exercising any discretion at all by prohibiting sustained yield analysis within the monument. It preordains a result and directs the Secretary, for all time, to prohibit commercial logging on the relevant O&C timberlands regardless of changing conditions on the ground. The mere fact that the Secretary could effectuate a similar outcome if given the freedom to exercise her statutorily mandated O&C Act discretion is insufficient to rescue the President's unlawful command.

V

Conservation is a noble goal, and national monuments have undoubtedly preserved and proliferated the richness of the American landscape. But the unfortunate back-end cost of conservation is that small, local communities reliant on the cultivation of natural resources to generate revenue to sustain them are often left behind. Congress sought to strike a balance with the O&C Act by granting the Secretary the

authority and ability to consider both the interests of conservation and the interests of local communities.[2]

I am troubled by the President's overt attempt to circumvent the balance struck by Congress and the majority's haste in labeling that attempt with the imprimatur of law. The decision today continues a troubling trend of increased judicial deference to Presidential uses of the Antiquities Act. As the Chief Justice has observed, this trend cannot continue indefinitely:

> Somewhere along the line, [the Antiquities Act's textual limits have] ceased to pose any meaningful restraint. A statute permitting the President in his sole discretion to designate as monuments "landmarks," "structures," and "objects"—along with the smallest area of land compatible with their management—has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea.

Massachusetts Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting the denial of certiorari). These issues are not going away. Just recently, President Biden designated two new national monuments spanning over half a million acres. *See FACT*

[2] Indeed, the Clinton Administration, which first established the Cascade-Siskiyou National Monument, once boasted that the administration had "stepped up to the challenge to get a sustainable timber supply pipeline flowing again." The Clinton White House, *The President's Forest Plan*, National Archives, https://clintonwhitehouse4.archives.gov/WH/EOP/OP/html/forest.html (last visited Apr. 7, 2023).

SHEET: President Biden Designates Castner Range National Monument, The White House (Mar. 21, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/fact-sheet-president-biden-designates-castner-range-national-monument/; *FACT SHEET: President Biden Designates Avi Kwa Ame National Monument*, The White House (Mar. 21, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/21/fact-sheet-president-biden-designates-avi-kwa-ame-national-monument/. I agree with the Chief Justice that this trend is unsustainable and likewise urge a return to the textual strictures of the Antiquities Act.

At oral argument, the government conceded that if Proclamation 9564 had expanded the monument to cover all 2.4 million acres of O&C land, it would have violated the O&C Act. But the government insisted that the Proclamation was lawful because the adverse effect on the O&C Act was minimal. By accepting that argument, the majority engages in a brand of incrementalism perilous to constitutional principles that are absolute.

It may be expedient to delegate unfettered control over the destiny of public lands to the President. But the Constitution enshrines our fundamental understanding that the separation of powers is an "essential precaution in favor of liberty." THE FEDERALIST NO. 47 (James Madison). Each branch of government has an obligation to police the boundaries of power and guard against delegations of, and encroachments on, their constitutionally vested power. THE FEDERALIST NO. 51. When called upon to adjudicate a case or controversy, the Judiciary, as the apolitical expositor of the Constitution, must decline to acquiesce in undertakings by the political branches that would sacrifice constitutional

safeguards on the altar of political expediency. *See United States v. Nixon*, 418 U.S. 683, 703 (1974).

Although the Constitution does not "absolutely separate" the three forms of governmental power, it absolutely prohibits the President from making law, even concerning the most inconsequential of matters. THE FEDERALIST NO. 47. Proclamation 9564 violates this prohibition because it directs the Secretary of the Interior to disregard her obligations under the O&C Act. Only Congress may do this.

Proclamations and executive orders of this reach are often responsive to criticisms by advocates that Congress is too formalistic and inflexible in performing its legislative function as originally envisioned by the Framers in today's dynamic world. The legislative process can sometimes be slow and frustrating, but the procedural strictures enshrined in our Constitution are unyielding because they exist to maintain our Republic's status as a government of laws and not of men. *See Bond v. United States*, 564 U.S. 211, 222-23 (2011); *Horne v. Dep't of Agric.*, 576 U.S. 350, 362 (2015) ("The Constitution . . . is concerned with means as well as ends."). As Justice Holmes once noted, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The majority seems unbothered by today's erosion of our constitutional principles. I am not so sanguine and must respectfully dissent.