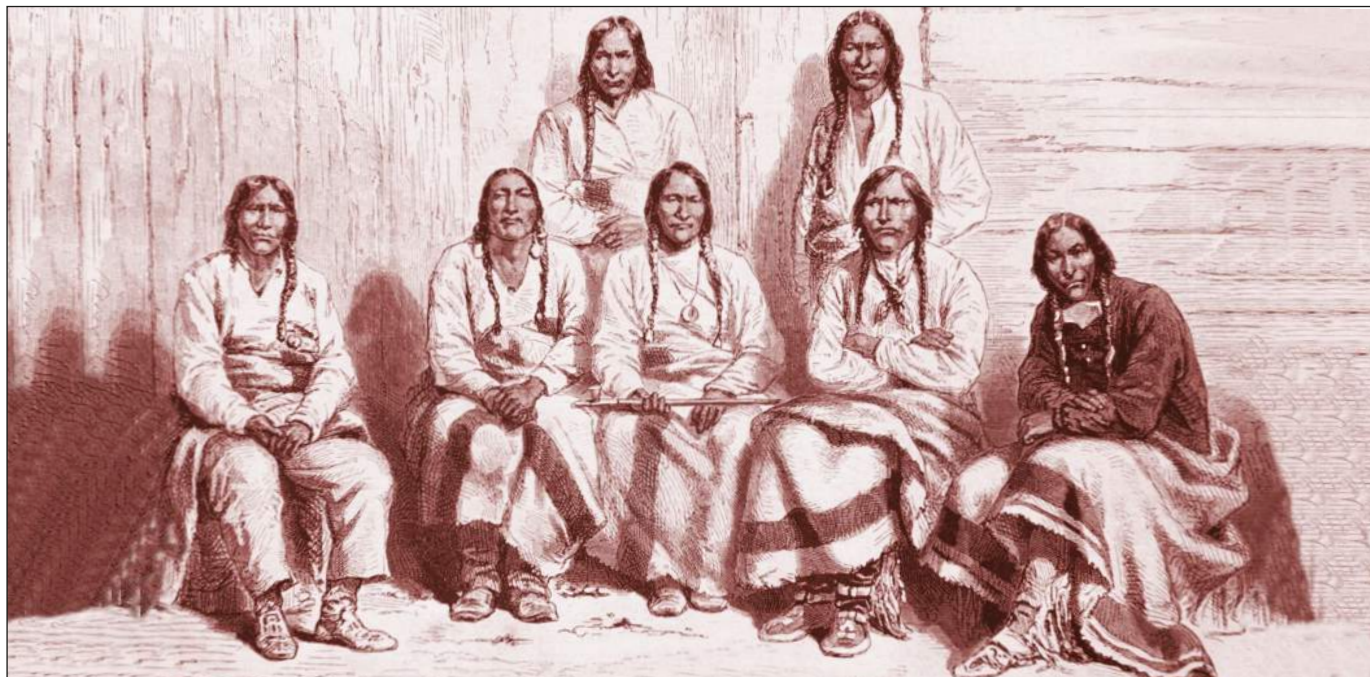


AMERICAN INDIAN SOVEREIGNTY



Chris Heilner / Alamy Stock Photo

This illustration depicts Cheyenne and Arapaho leaders assembled in Denver, Colorado, in 1863. In the Treaty of Fort Wise (1861), the U.S. government ceased to recognize the sovereignty of the Cheyenne and Arapaho nations, whose combined territory spanned Kansas, much of Nebraska, Eastern Wyoming, and Eastern Colorado.

Sovereignty is a political term that refers to the supreme power of a self-governing nation over its land and people. Over time, the U.S. Congress and the Supreme Court sharply weakened American Indian sovereignty, but a recent Supreme Court decision may begin to turn the tide.

The National Museum of the American Indian indicates that American Indian, Indian, Native American, and Native are acceptable terms for indigenous people in the U.S., though use of a specific tribal name is preferred. As historian Roxanne Dunbar-Ortiz wrote in *An Indigenous Peoples' History of the United States*, "I use 'Indigenous,' 'Indian,' and 'Native' interchangeably . . . Indigenous individuals and peoples in North America on the whole do not consider 'Indian' a slur." (This article follows these same guidelines on terminology.)

The Founding Fathers said little in the Constitution about the American Indian peoples (aka "nations" or "tribes") that lived around them:

- Art. I Sec. 2 Cl.3: Representation in the House of Representatives was based on counting all free persons, three-fifths of slaves, but "excluding Indians not taxed." Thus, American Indians were not considered citizens of the United States.
- Art. I Sec. 8 Cl.3: Only Congress had the power "to regulate Commerce with foreign nations, and among the several States and with the Indian Tribes." The tribes were therefore something different from foreign nations and the states.

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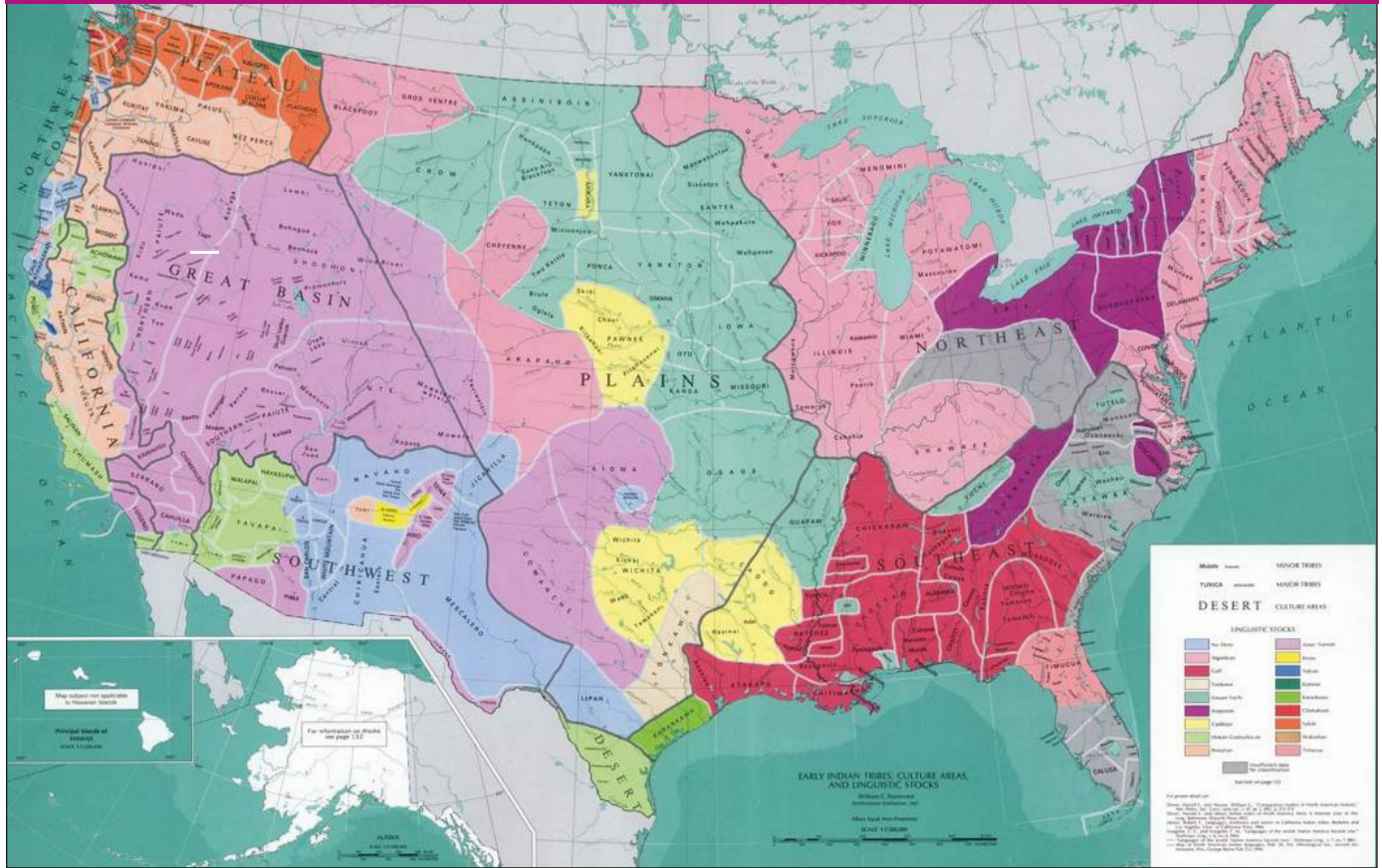
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**SPECIAL
NOTICE**

Early American Indian Tribes, Cultural Areas, and Languages

The National Atlas of the U.S.A., Dept. of the Interior, Geological Survey



- Art. II Sec. 2 Cl. 2: This provision gave the president the power to make treaties with the advice and consent of the Senate. This implied treaties with the Indians, which had been the practice of the British, the American colonies, and states before and after the Revolution.

At the time of the writing of the Constitution in 1787, most of the Native American tribes were sovereign nations. They were at the peak of their power, governed themselves, and occupied lands without interference from European settlers. But their sovereign status would soon change dramatically.

Removal of Indian Tribes

In 1787, Congress enacted the Northwest Ordinance to govern territory north of the Ohio River. This law recognized that Indian “land and property shall never be taken from them without their consent.”

A few years later, President George Washington was personally involved in securing one of the new country’s first treaties with American Indian people, the Treaty of New York in 1790. As part of this treaty, the Creeks gave up some of their land in Georgia to the U.S. in exchange for a trade deal and farming tools.

The treaty also called for the United States to protect the Creeks from outside threats. This provision, common in treaties with other tribes, made the Creeks somewhat dependent on the U.S. Treaties like this one were designed to secure peace, regulate trade, and prohibit white settlers from invading Native-occupied

lands. But as immigration to the U.S. from Europe surged, white settlers increasingly sought to acquire Native territories, provoking often violent confrontations.

Who owned the land where the American Indian peoples lived? In an 1823 Supreme Court decision, Chief Justice John Marshall wrote that the Indians had the right to *occupy* the land, but they could not *own it*. Marshall also wrote that as successors to the British in North America, only the United States federal government had the right to acquire Indian lands by treaty or conquest.

Native people had a different view. Tecumseh, a Shawnee leader in what is now Ohio and Indiana, once stated that the land “belongs to the first who sits down on his blanket or skins, which he has thrown upon the ground, and till he leaves it no other has right.”

A few southeastern Native nations, including the Creeks, Chickasaws, Choctaws, Seminoles, and Cherokees, early on began to adopt white Americans’ customs and social standards. They took up farming, learned English, built schools, created privately owned businesses, and adopted more strict class divisions within their society. A few among the elite even became slave owners, sometimes through intermarriage with white planters. Whites dubbed these nations the “Five Civilized Tribes.” They lived in various parts of what are now Florida, Georgia, Tennessee, North Carolina, Alabama, and Mississippi.

However, after gold was discovered on Cherokee land, Georgia began to take the land and claim it as

belonging to the state. White settlers flooded in and demanded the removal of all Native peoples living east of the Mississippi River.

In 1830, Congress and President Andrew Jackson passed the Indian Removal Act. Over the next few years, the U.S. pressured most Native nations in the east to sign treaties that gave up their lands in exchange for “reserved lands” (reservations) promised to them “forever.” These were mostly in what was called Indian Territory (now Oklahoma).

The Cherokee Cases

Meanwhile, the Cherokees resisted removal and went to the U.S. Supreme Court in 1831 to challenge the annexation of their land by Georgia. Chief Justice Marshall again wrote the decision. He ruled that the Cherokees could only give up their land voluntarily and only to the U.S., not to a state, like Georgia.

Marshall went on to declare that American Indian tribes were not foreign sovereign nations, but “dependent foreign nations.” According to his view, the Native peoples possessed only limited sovereignty.

Georgia next attempted to impose its laws on Cherokee lands. In 1832, the Cherokees went back to the Supreme Court. Marshall ruled this time that Cherokee treaties with the U.S. recognized their rights of self-government, rights to occupy land, and federal protection. Marshall concluded that state laws did not apply on Indian lands.

However, the state of Georgia and President Jackson ignored Marshall’s decision. Jackson was notoriously prejudiced against Native people, frequently calling them “savages.” An estimated 15,000 Cherokee men, women, and children were forced to leave their lands in Georgia and Alabama under U.S. military threat in the winter of 1838. During the 800-mile march to Indian Territory, an estimated 4,000 of these Cherokee people died in what survivors called the Trail of Tears.

Erosion of Indian Sovereignty

The U.S. did not leave American Indian nations alone on their reservations in Indian Territory. The federal Bureau of Indian Affairs (BIA) authorized white reformers and missionaries with little understanding of Native peoples to supposedly “civilize” them.

The missionaries wanted Native people to become Christian farmers and abandon their own culture, language, and beliefs. One cruel way they did this was to take Indian children from their parents without their permission to attend boarding schools off the reservation. At these schools, mainly white missionaries forced the children to conform to white American cultural norms.

With westward expansion throughout the 19th century came white settlers across what would become the continental United States. The U.S. annexation of most of the West after the Mexican-American War in 1848 especially led westward-moving white settlers to encroach on traditional Native lands in the Great Plains and Southwest.

In what became known as the “Indian Wars,” the U.S. Army, sometimes aided by state militias, fought Native peoples defending themselves and their traditional lands from the encroaching settlers. The wars ended after the Civil War, with the U.S. government forcing the tribes into new reservations.

In 1871, and without consulting any Native people, Congress decided to end treaty-making with Native nations. However, the nearly 400 treaties that had been signed since George Washington’s presidency remained in effect.

Up until 1885, Indian tribal courts handled criminal cases for crimes that occurred on reservations. But in that year, Congress passed the Major Crimes Act that transferred the jurisdiction of most felony crimes on a reservation to U.S. federal courts. (As we will see, this law is still important to understanding American Indian sovereignty today.)

In 1886, the Supreme Court upheld the Major Crimes Act. This decision by the court allowed Congress to exercise *plenary power*, or unlimited authority, over Indian affairs.

General Allotment Act

In 1887, Congress passed the General Allotment Act (aka the Dawes Act) with no Indian involvement or consent. This law offered allotments or parcels of reservation lands to individual Native men, who were expected to become farmers. They would get actual ownership of their allotments and become U.S. tax-paying citizens after 25 years. The goals of the act were to abolish the tribes by dividing tribal lands and to assimilate Indians to the mainstream of white American society.

The Kiowa nation, who had been forced onto a reservation in southwestern Oklahoma in 1867, sued the U.S. over the Dawes Act. They argued that it violated a treaty that said tribal lands could be broken up only with the consent of three-fourths of all adult Kiowa men.

In 1903, the Supreme Court decided that Congress could allot the tribal land of the Kiowa and all other Native nations without their consent even if doing so meant the U.S. government was breaking a treaty. The court ruled that all Indian matters were within the plenary control of Congress.

The effects of the Dawes Act, upheld by the Supreme Court decision, were devastating. During the nearly fifty years that the law was in effect, Native nations lost two-thirds of their reservation land. The federal government sold 90 million “surplus” acres of reservation lands to mainly white settlers. The BIA enforced policies that weakened or abolished tribal governments, courts, and laws. The BIA also prohibited Indians from practicing their Native religions, speaking their Native languages, and performing traditional ceremonies. Reduction of federal aid weakened Indian health and economic well-being.

In 1924, Congress passed a law that made all American Indians U.S. citizens. Many Native people



U.S. Assistant Secretary of the Army for Civil Works Jo-Ellen Darcy speaking by invitation to the Navajo Nation Council on January 27, 2016.

welcomed now having the right to vote, while many others, such as the Onondaga people of New York, opposed the law. They saw it as an attempt by the federal government to coerce Native people to assimilate to white society and to undermine tribal sovereignty.

As political scientist and member of the Lumbee Tribe of North Carolina David E. Wilkins has written, Native people did not ask for U.S. citizenship, but rather the 1924 law “thrust [citizenship] upon them without their consent.”

The Indian Reorganization Act

Congress sought to reverse American Indian policy during President Franklin Roosevelt’s New Deal. John Collier, the new head of the BIA, opposed assimilation policies. With Native input, Collier drafted a bill that became the Indian Reorganization Act (IRA), enacted by Congress in 1934. The law repealed the Dawes Act of 1887, ending the devastating allotment system, and allowed tribes to write their own constitutions.

The federal government gave money subsidies to tribes that adopted constitutions modeled on the U.S. Constitution. Writing about the IRA in 1983, Standing Rock Sioux historian Vine Deloria Jr. and his coauthor Clifford Lytle described the controversy of the new tribal constitutions. “The experience of self-government,” they wrote, “according to Indian traditions had eroded and, while the new constitutions were akin to the traditions of some tribes, they were completely foreign to others.”

While most Native nations accepted the IRA’s terms, some did not, most notably the Navajo Nation. In 1934, the Navajo were the largest Native population, inhabiting a reservation that stretched across parts of Utah, New Mexico, and Arizona.

The Termination Act

After World War II, the trend in U.S. policy swung

back to enforcing assimilation. In 1953, Congress passed the Termination Act, this act sought to permanently abolish all the tribes and end any U.S. responsibility for them. This would mean ending services like health and education, which had long been a U.S. “trust responsibility” in many treaties with Native nations.

Between 1953 and the late 1960s, the federal government terminated (ended) its relationship with over 100 tribes. The U.S. distributed reservation land to tribal members and sold other tribal land to non-Native people. The federal government also turned over its legal jurisdiction over terminated tribes to the states.

Self-Determination

Urged by President Richard Nixon, Congress yet again radically changed American Indian policy in the late 1960s by rejecting the termination policy. In 1968, Congress passed the Indian Civil Rights Act, which applied most, but not all, of the U.S. Bill of Rights to Native people on reservations.

While guaranteeing freedom of religion, the Indian Civil Rights Act did not prohibit the “establishment of religion” by tribes because of their historic tribal religions. Also, while it guaranteed criminal jury trials on reservations, the Indian Civil Rights Act did not guarantee juries in civil cases, leaving traditional tribal courts to decide these matters.

In 1975, Congress passed the Indian Self-Determination Act. This law once more promoted self-government and greater tribal sovereignty. The tribes now had the authority to administer reservation health care, schools, police, child custody, and many other programs that the federal government had long controlled. The act further recognized that the U.S. still had a trust responsibility to protect tribal treaty rights, lands, and resources.

Self-determination also meant encouraging the tribal governments to develop economic enterprises. The most successful of these has been Indian gaming casinos, although only about a third of the tribes in the U.S. have them on their reservations today.

Indian casinos are located on reservation land, but the tribes do not have complete sovereign control over them. Once again, in 1988 Congress intervened by passing the Indian Gaming Regulation Act. This act requires a tribal government to negotiate an agreement with the state over what games are allowed and what regulations are required before the U.S. Department of Interior approves the casino.

While the states cannot tax casino revenue, they may collect a percent of the earnings for state regulation costs. Some tribes distribute casino profits to tribal members. However, most use the revenue to pay for health clinics, schools, jobs, and other benefits for the entire tribe.

Indian Sovereignty Today

Today, there are over 550 federally recognized Indian tribes in more than 30 states. However, many Native Americans do not live on reservations.

Federalism, or the sharing of power by states and the federal government, can be complex. So, too, is the sharing of power between sovereign tribal governments, state governments, and the federal government.

Congress claims, and the Supreme Court agrees, that Congress has plenary or unlimited power over these special nations, even if the U.S. violates treaties it made with American Indians. However, the Supreme Court has ruled that certain treaty provisions must be respected.

The McGirt Case

In 2020, the Supreme Court issued a landmark decision regarding Native sovereignty. Jimmy McGirt, a Native American, was convicted of a felony by an Oklahoma state court. The crime took place in Oklahoma on lands reserved for the Creek nation as a “permanent home” by a treaty with the U.S. in 1833.

McGirt appealed, arguing that a federal court should have tried him instead of the Oklahoma state court. Recall that under the Major Crimes Act, the U.S. government, not Oklahoma, had jurisdiction over criminal cases.

Oklahoma argued that the Creek reservation had been “disestablished” (abolished) during the Allotment period in the early 20th century and was now state territory. However, writing for the 5-4 majority, Justice Neil Gorsuch ruled that Congress had never acted to disestablish the Creek reservation. Therefore, the

now-called Muscogee (Creek) Nation lands — comprising almost half of Oklahoma’s territory — still legally existed and were not state territory.

McGirt was entitled to a new trial in federal court. Moreover, the court’s decision restored to the Muscogee Nation a major element of its sovereignty, affirming the federal government’s responsibility to honor treaty obligations. “On the far end of the Trail of Tears was a promise,” Justice Gorsuch wrote. “Today . . . we hold the government to its word.”

Julian Brave NoiseCat, a member of the Secwepemc and St’at’imc Nations in Canada, wrote in July 2020, “In the long Indigenous struggle for justice, *McGirt v. Oklahoma* might be one of the most important Supreme Court cases of all time.” The *McGirt* decision made the important point that old treaties still matter.

WRITING & DISCUSSION

1. Summarize how the U.S. Constitution defined relations between the United States and Native nations.
2. The Indian Civil Rights Act of 1968 applies most, but not all, of the U.S. Bill of Rights to Native Americans on reservations. Why did Congress leave out certain rights? Do you agree? Why or why not?
3. In your opinion, what are the three most important events in the history of American Indian people’s sovereignty in the United States? Use evidence from the article to explain your answer.

For a timeline of major legislation discussed in this article, go to: <https://padlet.com/crfusa/2wz2ebu698gxj7j2>

ACTIVITY: Constitutional Self-Determination

Form small groups of no more than five. Half of each group will read the Zuni tribe’s preamble, and the other half will read the Menominee’s preamble. Answer the following questions for your reading, discussing them with your half of your group. When ready, take turns sharing your findings with the rest of your group:

1. What year was the constitution established?
2. List the basic goals described in each preamble.
3. What, if any, language in the constitution shows self-determination for the tribe?
4. What was happening in the development of tribal sovereignty when this constitution was established? Do you see effects of that in the language used? Use evidence from the article in your answer.

Preamble to the Constitution of the Zuni Tribe (1970)

We, the members of the Zuni Tribe, Zuni Indian Reservation, New Mexico, in order to secure to us and to our posterity the political and civil rights guaranteed to us by treaties and by the Constitution and statutes of the United States; to secure educational advantage; to encourage good citizenship; to exercise the right of self-government; to administer both as a municipal body and as a proprietor of our tribal affairs; to utilize, increase and protect our tribal resources; to encourage and promote all movements and efforts leading to the general welfare of our tribe; to guarantee individual rights and freedom of religion; and to maintain our tribal customs and traditions; do ordain and establish this constitution.

Preamble to the Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin (1991)

We, the members of the Menominee Tribe of Wisconsin, being a sovereign nation, in order to organize for the common good, to govern ourselves under our own laws and customs, to maintain and foster our tribal culture, to protect our homeland and to conserve and develop its natural resources, and to ensure our rights guaranteed by treaty with the Federal Government, do establish and adopt the following Articles and Bylaws of this Constitution and Bylaws for the government, protection, and common welfare of the Menominee Indian Tribe of Wisconsin and its members.

Standards Addressed

American Indian Sovereignty

California History-Social Science Standard 12.7. Students analyze and compare the powers and procedures of the national, state, tribal, and local governments. (1) Explain how conflicts between levels of government and branches of government are resolved.

California History-Social Science Standard 8.8. Students analyze the divergent paths of the American people in the West from 1800 to the mid-1800s and the challenges they faced. (2) Describe the purpose, challenges, and economic incentives associated with westward expansion, including the concept of Manifest Destiny (e.g., accounts of the removal of Indians, the Cherokees' "Trail of Tears," settlement of the Great Plains) and the territorial acquisitions that spanned numerous decades.

California History-Social Science Framework (2016), Ch. 17, p. 447: Teachers can emphasize how power and responsibilities are divided among national, state, local, and tribal governments and ask students to consider this question: Why are powers divided among different levels of government? Students should understand that local governments are established by the states, and tribal governments are recognized by constitutional provisions and federal law.

National U.S. History Standard 19. Understands federal Indian policy and United States foreign policy after the Civil War. **Middle School (1):** Understands interaction between Native Americans and white society (e.g., the attitudes and policies of government officials, the U.S. Army, missionaries, and settlers toward Native Americans; the provisions and effects of the Dawes Severalty Act of 1887 on tribal identity, land ownership and assimilation; the legacy of the 19th century federal Indian policy; Native American responses to increased white settlement, mining activities, and railroad construction). **High School (3):** Understands influences on and perspectives of Native American life in the late 19th century (e.g., how the admission of new western states affected relations between the United States and Native American societies; leadership and values of Native American leaders . . .).

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