

Structural Gaps in Deep-Sea Mining Governance: American Samoa and the Territorial Public Law Framework

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Abstract:

Deep-sea mining (DSM) in the Exclusive Economic Zone (EEZ) adjacent to American Samoa raises unresolved questions at the intersection of federal authority, territorial governance, and Indigenous institutional commitments. Although federal agencies possess broad regulatory authority offshore, existing statutory frameworks governing ocean resources were developed primarily for continental contexts and do not account for the distinctive legal and cultural foundations of American Samoa. This article examines how gaps in current law and administration expose the territory to unilateral federal decision-making without mechanisms tailored to its constitutional status.

Drawing on territorial constitutional doctrine, the Deeds of Cession, and comparative territorial precedent, the article argues that existing governance structures are incomplete rather than constitutionally fixed. It situates deep-sea mining within a broader pattern of tailored territorial governance and evaluates the institutional implications of this gap. The analysis concludes by considering the role of congressional commissions as a deliberative mechanism through which federal authority may be exercised in a manner consistent with established territorial practice.

Keywords: Deep-sea mining (DSM), Exclusive Economic Zone (EEZ).

1. Introduction

Federal interest in deep-sea mineral resources has renewed attention to the governance of the seabed beyond territorial waters. For American Samoa, this renewed interest intersects with a legal and institutional framework shaped by negotiated cession, distinctive constitutional treatment, and longstanding commitments to the preservation of Samoan land tenure, culture, and internal governance. Unlike other areas of environmental regulation, however, deep-sea mining in American Samoa's adjacent waters remains largely unaddressed by statutes tailored to the territory.

The absence of a DSM-specific governance framework has practical and constitutional implications. Federal agencies exercise authority in the Exclusive Economic Zone through general statutes and administrative processes that do not incorporate territorial institutions or culturally grounded modes of decision-making. This disconnect raises questions not about the existence of federal power, but about the structure through which that power is exercised.

This article examines the governance of deep-sea mining in American Samoa through a public law lens. It does not argue for or against mineral extraction as a policy matter. Rather, it asks whether existing legal frameworks adequately reflect the constitutional and historical foundations of the federal-territorial relationship. By situating DSM governance within territorial constitutional doctrine and comparative precedent, the article seeks to clarify the institutional options available to Congress and federal agencies when addressing offshore resource management in American Samoa.

The analysis proceeds in eight parts. Section 3 outlines the historical and legal foundations of American Samoa's territorial status, including the Deeds of Cession and the statutory framework governing federal administration. Section 4 identifies structural gaps in the current DSM regime. Section 5 situates those gaps within broader patterns of tailored territorial

governance. Section 6 examines the role of commissions as institutional tools for addressing complex territorial governance questions. Section 7 considers counterarguments and doctrinal limits. Section 8 concludes by summarizing the article's contribution to the legal analysis of territorial ocean governance.

2. Objective

This section provides the historical and legal foundations necessary to situate the analysis that follows. It outlines the constitutional status of American Samoa, the legal significance of the Deeds of Cession, and the statutory framework through which Congress exercises authority over the territory. Together, these elements establish the baseline against which contemporary governance questions particularly those involving offshore resources must be evaluated.

2.1 The Deeds of Cession and Territorial Status

American Samoa's relationship with the United States is grounded in the Deeds of Cession of 1900 and 1904, through which Samoan leaders ceded sovereignty to the United States while securing explicit protections for Samoan land tenure, culture, and internal governance.¹ These instruments were not unilateral assertions of federal authority; they were negotiated agreements that conditioned U.S. administration on respect for Samoan institutions.

Congress formally accepted and ratified the Deeds through statute, incorporating their terms into the legal framework governing the territory.¹⁶ Unlike organic acts adopted for other territories, American Samoa's governance structure developed incrementally through executive administration, local constitutional development, and selective congressional action. This distinctive path has shaped the contours of federal-territorial relations in ways that differ from both incorporated territories and states.

2.2 Congressional Authority and the Territorial Constitution

Congress exercises authority over American Samoa pursuant to Article IV of the U.S. Constitution. That authority, however, has been implemented through a combination of federal statutes, executive delegation, and local constitutional governance. The Revised Constitution of American Samoa, adopted locally and approved by the Secretary of the Interior, reflects this hybrid arrangement, preserving Samoan institutions while operating within the broader framework of U.S. territorial administration.¹

Judicial interpretation has consistently recognized American Samoa's distinctive legal status. Federal courts have declined to impose uniform constitutional rules where doing so would disrupt communal land tenure or local governance arrangements, acknowledging that the territory's institutions warrant accommodation within constitutional structure.¹⁰

2.3 Statutory Framework and Administrative Delegation

Congress has enacted relatively few statutes that address American Samoa directly. Among the most significant is 48 U.S.C. § 1661(b), which accepts the Deeds of Cession and authorizes the administration of the territory consistent with their terms.¹⁶ Beyond this, much of federal governance in American Samoa has been exercised through delegated authority to the Department of the Interior and other executive agencies.

This administrative model has allowed for flexibility and local adaptation but has also produced gaps where congressional guidance is absent. In areas such as land tenure and cultural preservation, courts and administrators have relied on the Deeds of Cession and territorial law to inform federal action. In offshore contexts, however, comparable statutory direction is limited, leaving unresolved questions about how federal authority should be exercised in relation to territorial commitments.

2.4 Implications for Contemporary Governance

The historical and legal foundations described here establish two critical premises. First, American Samoa's governance is shaped by bilateral commitments that condition federal authority on respect for Samoan institutions. Second, Congress has repeatedly relied on tailored approaches rather than uniform rules to administer the territory in a manner consistent with those commitments.

These premises do not dictate specific policy outcomes, but they provide the interpretive context necessary for evaluating contemporary governance challenges. The analysis in Sections 4 through 7 proceeds from this foundation, examining how existing legal structures address or fail to address the governance of deep-sea mining in American Samoa's Exclusive Economic Zone.

3. Structural Gaps in DSM Governance

The deficiencies of the current legal framework governing deep-sea mining (DSM) in American Samoa are not confined to abstract constitutional debate. They are embedded in the structure of U.S. ocean governance itself. Federal

statutes such as the Outer Continental Shelf Lands Act (OCSLA) and the Magnuson–Stevens Fishery Conservation and Management Act (MSA) were drafted for continental contexts and do not account for the cultural, institutional, and constitutional commitments that define American Samoa’s legal order.^{19,18} The result is a governance mismatch that is both constitutionally vulnerable and practically unstable.

3.1 The Constitutional Lens: “Impracticable and Anomalous”

The governance gaps surrounding DSM must be understood against the backdrop of territorial constitutional doctrine. The Insular Cases established that not all constitutional provisions apply uniformly in unincorporated territories, cautioning against the wholesale extension of mainland norms where local institutions would be disrupted.¹¹ Subsequent jurisprudence has refined this principle through the “impracticable and anomalous” standard, which recognizes Congress’s authority and responsibility to tailor governance where uniform application would undermine territorial arrangements.³

Federal courts have applied this doctrine to uphold communal land tenure in American Samoa¹⁰ and to sustain restrictions on land alienation in the Commonwealth of the Northern Mariana Islands under *Waboll v. Villacrusis*, expressly recognizing the constitutional legitimacy of protecting Indigenous systems.²⁶ Scholarly commentary has likewise emphasized that such tailoring is not an exception to constitutional order but a defensible feature of territorial governance.²⁰

Applied to ocean governance, the doctrine raises comparable concerns. The assertion of federal authority over DSM in American Samoa’s Exclusive Economic Zone (EEZ), absent statutory safeguards or meaningful territorial participation, risks imposing extractive frameworks developed for other jurisdictions onto a society whose cultural, subsistence, and governance practices are deeply intertwined with the ocean. Courts have not confined the doctrine to land-based regulation, and Congress retains discretion to legislate differently where territorial institutions are implicated.³

At the same time, reliance on the doctrine requires careful framing. Scholars have noted that it has, at times, been deployed to constrain rather than protect territorial autonomy.²⁰ In the context of American Samoa, its application must therefore be grounded in the commitments embedded in the Deeds of Cession, ensuring that constitutional flexibility functions as a mechanism for preserving institutional integrity rather than eroding it.

3.2 Structural Gaps in the Existing Regime

Beyond doctrine, the current DSM framework exhibits several structural deficiencies that expose the territory to unilateral federal action.

3.2.1 Absence of a DSM-Specific Statutory Framework

There is no federal statute governing DSM in American Samoa. The Bureau of Ocean Energy Management (BOEM) has proceeded through requests for information and programmatic planning without congressional guidance tailored to territorial conditions.^{4,5} This absence leaves federal agencies without clear statutory direction for integrating territorial interests or constitutional commitments into offshore decision-making.

3.2.2 Lack of a Defined EEZ Governance Mechanism

Territorial jurisdiction extends only three miles offshore under American Samoa law,² while federal assertions of authority in the EEZ lack an accompanying framework that accounts for the Deeds of Cession. This produces a legal gray zone in which neither territorial enforcement authority nor tailored federal governance operates.

3.2.3 Absence of Co-Management Structures

Federal agencies generally treat the American Samoa Government as a consulted stakeholder rather than as a co-governing authority. Programmatic environmental review processes have not established mechanisms for shared decision-making or binding territorial participation.⁴ This approach is difficult to reconcile with the governance and recognition commitments preserved at cession.

3.2.4 Lack of a Culturally Grounded Consent Process

Existing federal consultation mechanisms rely primarily on notice-and-comment procedures. These processes do not align with Samoan modes of collective deliberation and communal decision-making, raising questions of legitimacy where federal actions affect subsistence practices and cultural continuity.²¹

3.3 Synthesis of Structural Gaps

Taken together, these deficiencies reveal a systemic imbalance: federal agencies exercise broad discretion in the EEZ without statutory obligations to integrate territorial institutions, while the territory lacks mechanisms to assert its preserved governance role. This structural asymmetry underscores why the current status quo is unstable and why a more coherent governance framework is required.

4. Comparative Territorial Precedents

The structural gaps identified in Section 4 are not unique to American Samoa. Across U.S. territorial governance, Congress has repeatedly recognized that uniform federal statutes do not always account for the legal, cultural, and ecological realities of island jurisdictions. The resulting pattern has been one of tailored legislative and administrative frameworks designed to reconcile federal authority with territorial specificity. These precedents demonstrate that differentiated governance is not an anomaly, but a recurring and accepted feature of U.S. territorial law.

4.1 Tailored Environmental Legislation in the Territories

Congress has long exercised its authority to craft environmental statutes that apply explicitly to the territories while accommodating local conditions. The Coral Reef Conservation Act of 2000, for example, expressly includes American Samoa, Guam, the U.S. Virgin Islands, and Puerto Rico, reflecting congressional recognition of the unique ecological and cultural significance of reef systems in island contexts.⁹ Similarly, the Coastal Zone Management Act (CZMA) extends to the territories, with American Samoa operating an approved coastal management program administered in coordination with the National Oceanic and Atmospheric Administration.⁸

Other federal environmental statutes likewise apply to the territories, albeit with flexible implementation mechanisms. The Clean Water Act and the Clean Air Act establish nationwide standards while permitting territorial agencies to administer programs adapted to local capacity and conditions.^{7,6} The Endangered Species Act protects threatened and endangered species across territorial jurisdictions, including marine species of particular cultural and subsistence importance in American Samoa.¹²

These statutes illustrate a consistent legislative approach: Congress regularly legislates for territorial environments through frameworks that combine federal standards with locally administered programs. What is notably absent from this landscape is any comparable statute addressing deep-sea mining (DSM) in American Samoa's Exclusive Economic Zone. Unlike reefs, coastal waters, air quality, or endangered species, the seabed beyond territorial waters remains outside the reach of tailored legislative guidance.

4.2 Judicial Reinforcement of Tailored Governance

Judicial precedent further reinforces the legitimacy of differentiated territorial governance. In *Wabol v. Villacrusis*, the Ninth Circuit upheld land alienation restrictions in the Commonwealth of the Northern Mariana Islands, explicitly invoking the "impracticable and anomalous" doctrine to preserve Indigenous land tenure systems.²⁶ Courts in American Samoa have similarly sustained communal land protections against constitutional challenge, recognizing the centrality of these institutions to Samoan society.¹⁰

These cases confirm that constitutional accommodation for territorial distinctiveness is neither novel nor extraordinary. Rather, it reflects a longstanding judicial understanding that territorial governance may depart from mainland norms where necessary to preserve local institutions and fulfill congressional commitments.

4.3 Implications for DSM Governance

Taken together, these legislative and judicial precedents underscore a central point: the absence of a tailored governance framework for DSM in American Samoa is not the product of constitutional limitation, but of legislative inaction. Congress has repeatedly demonstrated its capacity to design environmental and resource management regimes responsive to territorial contexts. The failure to do so for DSM leaves American Samoa exposed to unilateral federal decision-making without the statutory safeguards present in other domains of environmental governance.

This comparative record situates the governance gaps identified in Section 4 within a broader pattern of territorial law. It also frames the discussion that follows by establishing that tailored governance mechanisms whether legislative, administrative, or institutional fall well within established constitutional practice.

5. Toward a Co-Governance Framework for American Samoa's EEZ

The structural gaps identified in Sections 4 and 5 point to a broader institutional problem rather than a single doctrinal defect. Federal authority over the Exclusive Economic Zone (EEZ) adjacent to American Samoa is exercised without a statutory framework that integrates territorial governance structures, cultural commitments, or the constitutional principles

that have historically guided tailored territorial administration. Addressing this deficiency requires an institutional response capable of reconciling federal authority with the obligations preserved at cession.

One mechanism that aligns with established congressional practice is the creation of a dedicated commission to examine and structure governance of American Samoa's EEZ. Commissions have long been used by Congress to address complex territorial, environmental, and historical questions that implicate overlapping legal regimes and competing institutional interests. In this context, a commission functions not as a substitute for congressional authority, but as a deliberative instrument through which that authority can be exercised in a manner consistent with constitutional and territorial commitments.

5.1 Congressional Commissions as Institutional Tools

Congress has repeatedly relied on commissions to evaluate governance challenges in the territories and to develop recommendations informed by local conditions. These bodies are typically tasked with fact-finding, consultation, and the development of legislative or administrative proposals, particularly where existing statutory frameworks prove inadequate. Their use reflects a recognition that certain governance questions especially those involving Indigenous institutions, land or resource management, and historical obligations cannot be resolved through generic regulatory processes alone.

In territorial contexts, commissions have served to clarify federal responsibilities, assess the impact of existing laws, and propose tailored governance structures that respect local institutions. This institutional practice situates a commission on American Samoa's EEZ well within the ordinary tools of congressional governance rather than at its margins.

5.2 Co-Governance and Territorial Participation

A central limitation of the current DSM regime is the absence of mechanisms that provide the American Samoa Government (ASG) with a meaningful role in offshore decision-making. Existing federal processes largely confine territorial participation to consultation rather than shared authority. A commission structure offers a pathway for addressing this imbalance by formalizing territorial participation in the development of governance frameworks applicable to the EEZ.

Co-governance in this sense does not imply the displacement of federal authority. Rather, it reflects a structured form of shared decision-making that recognizes the territory as more than an external stakeholder. Such arrangements are consistent with prior congressional efforts to accommodate territorial governance where local institutions are integral to the subject matter of regulation.

5.3 Relationship to the Deeds of Cession

Any institutional mechanism addressing EEZ governance must be evaluated in light of the Deeds of Cession, which preserve Samoan land tenure, cultural practices, and internal governance while authorizing federal administration. Although the Deeds do not speak directly to offshore resources, they establish a broader covenantal framework in which federal authority is exercised subject to commitments of protection and respect for Samoan institutions.

A commission charged with examining EEZ governance would provide a forum for interpreting how these commitments apply in the offshore context. By situating DSM governance within the historical and legal relationship between the United States and American Samoa, such a body would help ensure that future legislative or administrative action is informed by the constitutional and covenantal foundations of that relationship.

5.4 Limits and Scope of a Commission Approach

The use of a commission is not without limits. Commissions do not themselves enact law, nor do they resolve underlying political disagreements. Their value lies in structuring deliberation, consolidating expertise, and producing a record that can guide congressional or executive action. In the context of American Samoa's EEZ, a commission would not predetermine outcomes regarding DSM, but would instead clarify the legal, cultural, and institutional considerations that any durable governance framework must address.

Importantly, framing a commission as an evaluative and deliberative mechanism avoids the implication that a particular policy result is constitutionally required. It instead reflects a recognition that existing governance structures are incomplete and that further institutional development is necessary to reconcile federal authority with territorial commitments.

6. Counter arguments and Doctrinal Limits

Any proposal to reconsider governance of American Samoa's Exclusive Economic Zone (EEZ) must contend with counterarguments grounded in federal authority, administrative practice, and constitutional structure. These objections

warrant careful consideration, not because they defeat the analysis presented here, but because they clarify the limits within which any institutional response must operate.

6.1 Federal Plenary Power Under Article IV

One anticipated objection is that Congress possesses plenary authority over territories under Article IV of the U.S. Constitution, rendering additional governance mechanisms unnecessary. From this perspective, existing statutory frameworks and administrative discretion are sufficient to authorize federal action in the EEZ without further institutional development.

This argument accurately describes the breadth of congressional power, but it does not resolve how that power should be exercised. Courts have consistently recognized that plenary authority does not imply uniformity of governance, particularly where territorial institutions and preserved local arrangements are at stake.²⁶ The exercise of Article IV authority has historically included tailored statutory regimes that reflect territorial conditions rather than override them.

6.2 Adequacy of Existing Environmental and Administrative Law

A related counterargument holds that existing federal environmental statutes and administrative procedures already provide sufficient safeguards. Proponents of this view point to environmental review requirements, public participation processes, and agency expertise as adequate checks on offshore decision-making.

While these mechanisms play an important role, they do not address the structural gaps identified in Section 4. Environmental statutes regulate impacts; they do not allocate governance authority. Similarly, notice-and-comment procedures offer opportunities for input but do not confer shared decision-making power or resolve questions of institutional recognition. The absence of a DSM-specific statutory framework for American Samoa leaves these processes operating without guidance tailored to the territory's constitutional and cultural context.

6.3 Concerns about Sovereignty Expansion or Precedent

Another concern is that the creation of a commission or co-governance mechanism might be construed as expanding territorial sovereignty beyond established constitutional limits, potentially setting precedent for other jurisdictions. This concern reflects a broader anxiety within territorial law regarding incremental shifts in authority.

Framed properly, however, a commission does not alter sovereignty allocations. It neither transfers federal authority nor confers independent regulatory power on the territory. Instead, it functions as a deliberative mechanism through which Congress may exercise its existing authority in an informed and structured manner. Commissions of this kind have historically been used to evaluate complex territorial issues without prejudging outcomes or redefining constitutional status.²³

6.4 Risk of Doctrinal Overreach

A final objection cautions against overreliance on doctrines such as “impracticable and anomalous,” which have at times been invoked to limit rather than protect territorial rights. This critique is well taken. Doctrinal flexibility, if untethered from specific commitments, risks becoming a tool of convenience rather than protection.

For this reason, the analysis presented here does not treat constitutional doctrine in isolation. Instead, it situates doctrinal flexibility within the historical and legal commitments reflected in the Deeds of Cession. By anchoring interpretation to these bilateral commitments, the risk of doctrinal overreach is constrained, and constitutional accommodation operates as a means of preserving institutional integrity rather than diminishing it.^{24,25}

6.5 Implications for Institutional Design

Taken together, these counterarguments clarify the scope of the inquiry. They do not negate the need for further institutional development; rather, they define its boundaries. Any governance mechanism addressing DSM in American Samoa's EEZ must respect federal authority, avoid unintended sovereignty implications, and remain grounded in established constitutional and territorial principles.

Within these limits, a commission-based approach offers a measured response to identified structural gaps. It preserves congressional control, incorporates territorial participation, and generates a record capable of informing future legislative or administrative action. The analysis that follows proceeds from this constrained understanding of institutional design.

7. Conclusion

This article has examined the governance of deep-sea mining in the Exclusive Economic Zone adjacent to American Samoa through the lens of territorial public law. Rather than questioning the existence of federal authority offshore, the analysis has focused on how that authority is structured and on the consequences that follow when governance frameworks developed for

continental contexts are applied without adaptation to a territory defined by negotiated cession, preserved institutions, and constitutional accommodation.

The review of historical foundations demonstrates that American Samoa occupies a distinctive legal position within the U.S. territorial system, grounded in the Deeds of Cession and implemented through a combination of congressional action, executive administration, and local constitutional governance. Within this framework, federal authority has long been exercised in ways that recognize and protect Samoan land tenure, cultural practices, and internal governance arrangements.

Against this background, the article identified structural gaps in the current approach to deep-sea mining. The absence of a DSM-specific statutory framework, the lack of a defined governance mechanism for the EEZ, limited opportunities for co-governance, and the mismatch between federal consultation procedures and Samoan modes of collective decision-making together reveal an incomplete institutional design. Comparative territorial precedents further demonstrate that tailored governance is neither exceptional nor constitutionally suspect, but a recurring feature of congressional practice.

The analysis of institutional options situates congressional commissions as one mechanism through which these gaps may be examined and addressed. Properly framed, such commissions do not alter constitutional status or redistribute sovereignty. Instead, they provide a structured forum for deliberation, fact-finding, and institutional design, consistent with established approaches to complex territorial questions. Consideration of counterarguments underscores the importance of restraint, highlighting the need to respect federal authority, avoid doctrinal overreach, and ground any institutional response in existing legal commitments.

Taken together, the article's contribution is clarificatory rather than prescriptive. It maps the legal and institutional terrain governing offshore resource management in American Samoa and identifies where existing frameworks fall short of the constitutional and historical foundations of the federal-territorial relationship. By doing so, it provides a basis for more coherent analysis of territorial ocean governance whether in the context of deep-sea mining or future questions involving the use of offshore resources in American Samoa.

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