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## Lost at Sea: The Continuing Decline of The Supreme Court in Admiralty

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# Lost at Sea: The Continuing Decline of The Supreme Court in Admiralty

MICHAEL SEVEL\*

*For the first 200 years of its history, the United States Supreme Court served as the primary leader in the development of, and its cases the primary source of, the admiralty and maritime law of the United States. That appears to be changing. The Court's admiralty cases over the last quarter century indicate that it is slowly giving up its traditional leading role in creating and developing rules of admiralty law, and instead deferring to Congress to make those rules, a trend that is tantamount to abandoning its Article III constitutional duty to serve as the country's only national admiralty court. Some scholars believe that this trend is just as it should be. It has been recently argued that the Court's two centuries of federal common lawmaking in admiralty is, and always has been, unconstitutional, and ought to be curtailed with few exceptions. Federal admiralty law should therefore*

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*be “normalized” and brought into conformity with the same principles of federalism and separation of powers which govern most other areas of federal law. This Article examines the Court’s most recent admiralty case, *Lozman v. City of Riviera Beach, Florida*, and argues that it represents a striking escalation in the Court “normalizing” federal admiralty law. The many objectionable features of *Lozman*, however, form the basis of a pragmatic argument against the Court adopting a normalization approach. In largely ignoring hundreds of years of its own cases, the Court’s reasoning was arbitrary, unpredictable, and provides virtually no guidance to the state and lower federal courts. Properly understood, the troubling aspects of the case justify a return to the Court’s traditional, constitutionally prescribed role of making rules of decision in admiralty in the manner of a common law court.*

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## INTRODUCTION

For the first 200 years of its history, the United States Supreme Court served as the primary leader in the development of, and its cases the primary source of, the admiralty and maritime law of the

United States. This claim is not the outcome of a creative scholarly interpretation of its cases; nor is it wishful thinking rooted in an activist ideology. Article III of the U.S. Constitution provides that “The judicial power shall extend. . . to all cases of admiralty and maritime jurisdiction.”<sup>1</sup> It is commonly acknowledged that this is the only subject matter grant of jurisdiction in the Constitution.<sup>2</sup> There is also broad consensus that Article III establishes a constitutional duty on the Court to make, develop, and apply the general maritime law of the United States.<sup>3</sup> In recognition of this duty, the Court itself has self-identified as the primary lawmaking body in admiralty for virtually its entire history. Because “the Judiciary has traditionally taken the lead in formulating flexible and fair remedies

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<sup>1</sup> U.S. CONST., art. III, § 2.

<sup>2</sup> See THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 1 (5<sup>th</sup> Hornbook ed. 2012) (“This grant of judicial power is the only instance where the Constitution delegates jurisdiction over an entire subject matter to the federal judiciary.”).

<sup>3</sup> See *Madruza v. Super. Ct.*, 346 U.S. 556, 566 (1954) (Frankfurter, J., dissenting) (“[f]rom the admiralty clause of the Constitution, this Court has drawn probably greater substantive law-making powers than it exercises in any other area of the law.”); see also *Northwest Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95–96 (1981) (“We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law.”) It is often said, correctly, that the unique subject matter grant of jurisdiction *grounds* the duty of the Court to make general admiralty law. See Steven F. Friedell, *The Diverse Nature of Admiralty Jurisdiction*, 43 ST. LOUIS L. J. 1389, 1391 (1999); Note, *From Judicial Grant to Legislative Power: the Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1230–37 (1954). It has been objected to this view that the admiralty clause is *not* a unique subject matter grant, and that other jurisdictional grants in Article III are similarly subject matter grants. For example, it is suggested that the grant of federal question jurisdiction equally refers to a discrete subject matter, and, further, and that given the many and various tests of admiralty jurisdiction drawn by the federal courts over the years, the result is that “admiralty. . . is largely a *place* – not a subject.” See Ernest Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS L. J. 1349, 1351 n.14 (1999). This view takes an unnecessarily capacious view of ‘subject matter.’ The clauses establishing federal question jurisdiction— extending the judicial power to cases arising “under this Constitution” and under “the laws of the United States” (U.S. CONST. art. III, § 2)—refer not to the subject matter, but the sources, of those laws. By contrast, the phrase “admiralty and maritime” (*Id.*) refers not to a source of law, nor merely to a place, but to a distinctive, stable, but evolving, set of activities, industries, practices, and customary norms arising from those practices.

in the law maritime,”<sup>4</sup> it has always been the case that “the preponderant body of maritime law comes from this Court and not from Congress.”<sup>5</sup> As recently as 2008, the Court recognized that “maritime law. . . falls within a federal court’s jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result.”<sup>6</sup> The Supreme Court has therefore long been, and has acknowledged itself to be, the American High Court of Admiralty, as one prominent admiralty scholar recently put it.<sup>7</sup>

That appears to be changing. The Court’s admiralty cases over the last quarter century indicate that it is gradually giving up its traditional leading role in creating and developing rules of admiralty law. In short, the Court is increasingly relying on Congress to take the lead in crafting the substantive rules of admiralty law, and is stepping in to make law only interstitially in applying federal statutes, as it has long done in many other areas of federal law. The *general* maritime law of the United States—a body of general, judge-made law developed from centuries-old transnational customary legal principles<sup>8</sup>—appears to be slowly but steadily on its way out.<sup>9</sup>

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<sup>4</sup> *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207 (1994) (quoting *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)).

<sup>5</sup> *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 323 (1955) (Frankfurter, J., concurring). *See also* *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960) (Frankfurter, J., dissenting) (“No area of federal law is judge-made at its source to such an extent as is the law of admiralty.”); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963) (“Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.”).

<sup>6</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489–90 (2008).

<sup>7</sup> *See* David W. Robertson, *Our High Court of Admiralty and its Sometimes Peculiar Relationship With Congress*, 55 ST. LOUIS U. L. J. 491 (2011). *See also* Hon. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249 (1993).

<sup>8</sup> *See* James Allsop, *Maritime Law: The Nature and Importance of its International Character*, 84 AUST. L. J. 681, 682–87 (2010) (discussing the history of adoption of international general maritime legal principles by U.S. federal courts since the eighteenth century); WILLIAM TETLEY, *INTERNATIONAL MARITIME AND ADMIRALTY LAW* 5–32 (Yvon Blais ed., 2002) (discussing the history of transnational general maritime legal principles from ancient times to the present).

<sup>9</sup> The clearest beginning of the trend is *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990) (“We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply

Some scholars believe that this trend is just as it should be. It has been recently argued that the Court's two centuries of federal common lawmaking in admiralty is, and always has been, unconstitutional, and ought to be curtailed with few exceptions. As the view's most articulate proponent has suggested, federal admiralty law should accordingly undergo a process of "normalization," whereby it conforms to the orthodox, post-*Erie*<sup>10</sup> view that there is no "general" federal law of any kind, law which can be made entirely independent of Congressional action, and which also pre-empts state law in a manner identical to federal statute. The argument for normalization suggests that therefore the federal courts should have highly circumscribed common lawmaking powers across *all* areas of federal law, including admiralty.<sup>11</sup>

I will argue that the Court's most recent admiralty case, *Lozman v. The City of Riviera Beach, Florida*,<sup>12</sup> represents a striking escalation in a trend of normalization in admiralty law by the Supreme Court, and therefore signals a decisive shift away from the Court playing its constitutionally prescribed and traditional role of making and developing federal admiralty law independently of Congress. In

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because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed."), but one federal circuit judge has argued that the trend extends as far back as *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (holding that the Death on the High Seas Act implicitly precludes the availability of nonpecuniary damages for loss of society under the general maritime law). *See also* Brown, *supra* note 7, at 277–78.

<sup>10</sup> *See* *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts sitting in diversity jurisdiction do not have the power to create federal common law).

<sup>11</sup> Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 471 (2004):

I conclude that admiralty's 'special' constitutional status cannot be justified, and that reforming admiralty may point the way toward salutary changes in our foreign affairs jurisprudence. In particular, the same basic constitutional rules about preemption and federal lawmaking that govern ordinary domestic law should govern both these areas. Both admiralty and foreign affairs law need to be 'normalized.'

*See also infra* note 171.

<sup>12</sup> 133 S. Ct. 735 (2013).

*Lozman*, the Court faced one of the most fundamental questions of any body of maritime law: what is a vessel?<sup>13</sup> And despite having nearly 150 years of its own precedent on which to rely,<sup>14</sup> the Court determined that its sole task was to provide an interpretation, unconstrained by and unrelated to precedent, of the definition of the term “vessel” as it appears in the Rules of Construction Act,<sup>15</sup> a statute originally enacted in 1873 but, notably, not fully embraced by the Court until 2005 as providing the default definition of “vessel” to be applied throughout the U.S. Code.<sup>16</sup> As a result of this narrowly conceived judicial task in *Lozman*, the Court articulates a test for vessel status, the “reasonable observer” test,<sup>17</sup> virtually *ex nihilo*, bearing no relation to any principle it has ever recognized in its over two hundred-year history as an admiralty court. Not surprisingly, state and lower federal courts have subsequently struggled in finding a consistent meaning and application of this test.<sup>18</sup>

The principled scholarly arguments for normalizing admiralty law are subtle and complex, and a comprehensive response to them will have to wait for another occasion. In what follows, however, I will make two arguments about the connection between *Lozman* and the normalization of admiralty law by the Supreme Court. First, I

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<sup>13</sup> See *Id.* at 739.

<sup>14</sup> The Court’s earliest cases addressing vessel status are *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865) (holding that damage to a warehouse caused by a fire on a ship did not fall within admiralty jurisdiction) and *The Rock Island Bridge*, 73 U.S. 213 (1867) (holding that a bridge extending over water is not a vessel). However, the earliest case of any precedential significance is *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887).

<sup>15</sup> 1 U.S.C. §3 (2012) (defining “vessel” as including “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”).

<sup>16</sup> See *Stewart v. Dutra Construction Company*, 543 U.S. 481, 489–90 (2005). Although the Court in *Stewart* acknowledged that “Section 3 merely codified the meaning that the term ‘vessel’ had acquired in general maritime law” (*Id.*, at 490), the full embrace of 1 U.S.C. §3 as generally applicable throughout the U.S. Code can itself be taken as a deliberate step in the direction of normalization. *Id.*

<sup>17</sup> *Lozman*, 133 S. Ct. at 741.

<sup>18</sup> See David W. Robertson and Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 40 TUL. MAR. L. J. 343, 392–93 (2016) (discussing the influence of *Lozman* on how state and federal courts have struggled to apply the “reasonable observer” test.)

argue that the *Lozman* case, in which the Court radically and unpredictably shifted the boundaries of the admiralty jurisdictional tests which depend upon vessel status, is best explained by the Court's adoption of a strategy of normalizing in admiralty—in this case, to defer to Congress to take the lead in defining what is a vessel, and for the Court to engage in common lawmaking only interstitially and as Congress clearly intends. The Court, from the beginning of the case, understood its task narrowly, as merely an exercise in statutory construction, and not also aiming at having its reasoning and conclusion cohere with over a century of precedent; it then developed a test for vessel status that has no discernable basis in either the Court's jurisprudence or federal statute. These and other aspects of the case are explainable only in terms of its implicit acceptance of the view that federal admiralty law should be normalized. Second, I will argue that these troubling aspects of *Lozman*, coupled with the apparent and unusual carelessness displayed by the Court in reviewing the case,<sup>19</sup> constitute an argument *against* the normalization of admiralty. While there may be principled reasons to resist normalization, *Lozman* suggests a *pragmatic* argument against that approach: adopting it encourages the Court to abandon its history as a national admiralty court and to develop unprincipled and arbitrary rules of decision, amounting to an abandonment of the constitutional duty to develop a uniform, coherent general maritime law of the United States.

In Parts I–II, I briefly set out the relevant legal and procedural background leading up to the *Lozman* judgment. In Part I, I review the relevant federal law determining vessel status at the time of the Court's granting of certiorari on *Lozman*. In Part II, I evaluate the reasons for and against the granting of certiorari, and conclude that the *ex ante* case for certiorari was dubious at best. I then adduce evidence, based on both the oral argument of *Lozman* and extra-judicial statements of Chief Justice Roberts, which indicates that the Court did not take review of the *Lozman* case seriously, and that it did not sufficiently appreciate the significance and possible ramifications of its ruling for the coherence of the larger body of federal admiralty law. In Part III, I critically discuss Justice Breyer's majority opinion in the case, in which the Court invents a new test for

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<sup>19</sup> See *infra*, Part II.

vessel test from whole cloth; I then discuss Justice Sotomayor's dissent, which is far more attentive to the Court's earlier cases, and therefore rejects the majority's implicit endorsement of normalizing admiralty. In Part IV, I outline the arguments for the normalization of admiralty law developed over the last twenty years by federal courts scholars. Finally, in Part V, I show that *Lozman* is best understood as an exercise in the normalization of admiralty by the Court, and argue that *Lozman* demonstrates, from a practical point of view, many of the vices of normalizing federal admiralty law, precisely because it severely limits the Court's role in shaping it. I argue that the *Lozman* case thus constitutes a pragmatic argument against any further implementation of a normalization strategy in federal admiralty jurisprudence.

#### I. SETTING THE STAGE: VESSEL STATUS BEFORE *LOZMAN*

Before approaching *Lozman*, it is necessary to briefly summarize the state of the law on vessel status, which is often one aspect of determining admiralty jurisdiction, prior to the *Lozman* case reaching the Supreme Court. Section 3 of the Rules of Construction Act provides that "the word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."<sup>20</sup> This definition has been codified in federal law since 1873,<sup>21</sup> but the Supreme Court and the federal circuits have long been ambivalent about whether the Section 3 definition is the, or even *an*, authoritative standard in determining vessel status. Before *Lozman*, the Supreme Court decided six cases significantly addressing the issue of what constitutes a vessel under federal admiralty law. One of those cases, *The Robert W. Parsons*,<sup>22</sup> which was decided thirty years *after* the statutory definition was enacted, was regarded for decades as the leading case in the Court's vessel status jurisprudence, and it does not mention Section 3 at all. The Court's attention to the issue has also been sporadic. There was an active period in the late nineteenth- and early twentieth century, over a span of thirty-nine years (1887–1926), during which

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<sup>20</sup> 1 U.S.C. §3 (2012).

<sup>21</sup> *See* Stewart, 543 U.S. at 489–90.

<sup>22</sup> 191 U.S. 17 (1903).

the Court found vessel status in four cases and offered a line of substantive reasoning justifying those conclusions.<sup>23</sup> A fifth, relatively easy case (involving an ordinary barge) came in 1944.<sup>24</sup> There was then a sixty-one year period in which the Court was silent on vessel status, though the lower courts, and especially the Fifth Circuit, developed vessel status jurisprudence considerably during that time, and, again, often without relying on 1 U.S.C. §3 at all.<sup>25</sup>

The Court's long reticence on vessel status ended with review of a case from the First Circuit, *Stewart v Dutra Construction Co.*<sup>26</sup> In *Stewart*, the plaintiff was injured while working on the *Super Scoop*, one of the largest floating dredges in the world, while digging what is now the Ted Williams Tunnel beneath Boston Harbor.<sup>27</sup> The plaintiff subsequently filed a claim for compensation under the Jones Act.<sup>28</sup> Since the Jones Act provides a cause of action for negligence for injured seamen, the Court had to determine whether the plaintiff was a seaman under the definition provided by the Longshore and Harbor Workers' Compensation Act, "a master or member of a crew of any vessel."<sup>29</sup> That determination rested entirely on whether the *Super Scoop* was a vessel within that definition of a seaman.

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<sup>23</sup> See *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 627–28 (1887) (holding that a floating dry-dock was not a vessel); *The Robert W. Parsons*, 191 U.S. at 33–34 (holding that a horse-drawn Erie Canal boat was a vessel); *Ellis v. United States*, 206 U.S. 246 (1907) (holding that scows and floating dredges were vessels); *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926) (holding that a wharfboat on the Ohio River was not a vessel). Among these cases, only *Evansville* cites 1 U.S.C. §3.

<sup>24</sup> See *Norton v. Warner Co.*, 321 U.S. 565 (1944) (holding that a barge was a vessel), which relied on the Section 3 definition (at 572 n.4).

<sup>25</sup> See, e.g., *Davis v. Cargill, Inc.*, 808 F.2d 361 (5th Cir. 1986); *Atkins v. Greenville Shipbuilding Corporation*, 411 F. 2d 279 (5th Cir. 1969); *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643 (1st Cir. 1973); *U.S. v. Moran Towing & Transp. Co.*, 374 F.2d 656 (4th Cir. 1967); *Bernardo v. Bethlehem Steel Co.*, 314 F.2d 604 (2nd Cir. 1963). None of these cases rely on, or even reference, 1 U.S.C. §3.

<sup>26</sup> *Stewart*, 543 U.S. 481 (2005).

<sup>27</sup> *Id.*, at 484–485.

<sup>28</sup> 46 U.S.C. §30104 (2006).

<sup>29</sup> 33 U.S.C. §902(3)(G). The Court has long taken §902(3)(G) to provide the statutory definition of a seaman, used to trigger coverage of the Jones Act. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991) ("Master or member of a crew' [§902(3)(G)] is a refinement of the term 'seaman' in the Jones Act.").

The Court was faced with the usual task of resolving a conflict in the lower courts, but in this instance the conflict was unusually one *within* the Fifth Circuit. In the decades leading up to *Stewart*, Fifth Circuit panels had uniformly begun the vessel status inquiry with the criteria set out in *The Robert W. Parsons*, examining “the purpose for which the craft is constructed and the business in which it is engaged,”<sup>30</sup> but had gone in two different directions in determining vessel status of floating structures with special purposes, such as spud barges, jack-up rigs, and other floating work platforms.<sup>31</sup> In one line of cases, the Fifth Circuit took something close to an anything-that-floats approach, finding vessel status even if the structure was immobilized, moored to land, and therefore not easily taken into navigation.<sup>32</sup> Judge Davis summarized the approach this way: “Despite the outward appearance of the structure at issue, if a primary purpose of the craft is to transport passengers, cargo, or equipment from place to place across navigable waters, then that structure is a vessel.”<sup>33</sup> In another line of cases, Fifth Circuit panels took a narrower approach. Using another one of the Supreme Court’s early cases, *Cope v. Vallette Dry Dock Co.*, in which a floating dry dock was deemed not a vessel,<sup>34</sup> the Fifth Circuit occasionally did not find vessel status if the floating structure was constructed and used primarily as a work platform, was moored at the time of the accident, and, although was capable of movement and

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<sup>30</sup> *The Robert W. Parsons*, 191 U.S. at 30.

<sup>31</sup> A useful summary of the disagreement within the Fifth Circuit preceding *Stewart* is given by Judge Davis in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344, 347–351 (1998).

<sup>32</sup> See *Cook v. Belden Concrete Prods.*, 472 F.2d 999, 1001 (5th Cir. 1973) (Stating that “unconventional craft [such] as submersible drilling barges and floating dredges which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction and retain such status even while moored, dry-docked, or otherwise immobilized and secured to land.”).

<sup>33</sup> *Manuel*, 135 F.3d at 348 (citations omitted).

<sup>34</sup> *Cope*, 119 U.S. at 627–628 (“A fixed structure, such as this dry dock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water. The fact that it floats on the water does not make it a ship or vessel . . . A ship or vessel, used for navigation and commerce, though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service.”).

sometimes did in fact move across navigable water, that transportation function was merely incidental to its primary purpose of serving as a work platform.<sup>35</sup>

The Supreme Court in *Stewart* clearly found the *Super Scoop* in many ways an ideal occasion to resolve this decades-long conflict, as it was both used as a work platform but, as is typical of dredges, required movement across navigable water in order to discharge its function, and yet was stationary at the time of the plaintiff's injury. The Court began its analysis by fixing the definition of "vessel" in 1 U.S.C. §3 as the focal point of inquiry: "every description of water-craft and other contrivance used, or capable of being used, as a means of transportation on water." This definition, it held, "merely codified the meaning that the term 'vessel' had acquired in general maritime law"<sup>36</sup> and "continues to supply the default definition of 'vessel' throughout the U.S. Code."<sup>37</sup> This maneuver both signalled to the circuits that the statutory definition is to be the primary, though not the only, object of interpretation, and also streamlined its own interpretive task in the case.

The *Stewart* Court construed "capable of being used" in the statute as meaning being *practically* capable of such use: "the question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one."<sup>38</sup> The primary sense of *theoretical* capability that defeats vessel status is when a structure is "permanently moored" to the shore.<sup>39</sup> It further reasoned that Section 3 did not require that a structure be used primarily for the purpose of transportation over water, but only that it *could* be so used.<sup>40</sup> Finally, it rejected a "snapshot" test of vessel status by not requiring an inquiry into whether the watercraft was moving at the time of an accident; however, "structures may lose their character as vessels if they have been

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<sup>35</sup> See *Bernard v. Binnings Constr. Co. Inc.*, 741 F.2d 824, 831 (5th Cir. 1984).

<sup>36</sup> *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 490 (2005).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 496.

<sup>39</sup> *Id.* at 494 ("Simply put, a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.").

<sup>40</sup> *Id.* at 495.

withdrawn from the water for extended periods of time.”<sup>41</sup> On this complex interpretation of Section 3, the *Super Scoop* clearly was a vessel.<sup>42</sup> And while the Court arguably narrowed slightly the scope of Section 3, with the caveat of requiring *practical* capability of transportation over water, defeated only by permanent mooring, it nonetheless likely intended *Stewart* to bring relative certainty on the vessel status issue for the lower courts for the foreseeable future.

But nearly immediately after *Stewart* was decided, a conflict between the Fifth and Eleventh Circuits arose that would lead to the Court granting certiorari on *Lozman* as an occasion to resolve it. In 2006, the Fifth Circuit ruled in *De La Rosa v. St. Charles Gaming Co.*<sup>43</sup> that a riverboat casino in Louisiana which was “indefinitely moored to the land by lines tied to steel pilings”<sup>44</sup> for the previous five years, but was otherwise fully operational, was not a vessel because “the Defendants do not intend to use it as such. Rather, their intent is to use it solely as an indefinitely moored floating casino. Its operations are entirely gaming-related, and not maritime in nature.”<sup>45</sup>

Two years later, the Eleventh Circuit decided *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*,<sup>46</sup> holding that a riverboat casino that had been indefinitely moored “with steel cables, received utility lines from land, and engaged in a business that could have physically, if not legally, been conducted on shore” was nonetheless a vessel for purposes of an *in rem* action.<sup>47</sup> The structure was moored on Lake Ponchartrain for four years, but had broken free and was damaged during Hurricane Katrina. The Court explicitly rejected the Fifth Circuit’s consideration of the intention of the owner of the structure in *De La Rosa*, and focused only on whether the structure was practically capable of transportation over water. The Eleventh Circuit reasoned that

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<sup>41</sup> *Id.* at 496.

<sup>42</sup> *Id.* at 497.

<sup>43</sup> 474 F.3d 185 (5th Cir. 2006). The court quotes 1 U.S.C. §3 (*Id.* at 187), but the statute seems not to have played any significant role in its reasoning.

<sup>44</sup> *Id.* at 187.

<sup>45</sup> *Id.*

<sup>46</sup> 535 F.3d 1299 (11th Cir. 2008).

<sup>47</sup> *Id.* at 1307.

The owner's intentions with regard to a boat are analogous to the boat's 'purpose,' and *Stewart* clearly rejected any definition of 'vessel' that relies on such a purpose. . . . Under . . . *De La Rosa*, a boat may enter and leave admiralty jurisdiction on the basis of state law and the individual thoughts of the boat owner as to what use of the boat is most desirable . . . . Such a result is clearly not what the Supreme Court intended.<sup>48</sup>

The Eleventh Circuit determined that the *Belle of Orleans* was a vessel for admiralty jurisdiction purposes, because it was practically capable of transportation or movement, as it was still functionally operational and could move under its own power.<sup>49</sup>

This conflict therefore set the stage for the Supreme Court to grant certiorari on a case which would provide an opportunity to settle several issues that arose subsequent to *Stewart*: (1) to address the relevance of the intention of the owner in regards to the purpose of the floating structure, (2) to establish some way to determine whether a floating structure was "indefinitely" or "permanently" moored, and (3) to comment on the relevance of these facts for determining practical capability. The next case would also give the Court a chance to clarify (4) the substantive relationship between 1 U.S.C. §3 and the 150 years of its own precedent on vessel status, especially given the fact that the lower courts (especially the Fifth Circuit) have historically been inclined to rely only on the cases, and ignore the statutory definition, at least as often as they have looked to the statute alongside the cases for guidance.<sup>50</sup>

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<sup>48</sup> *Id.* at 1311.

<sup>49</sup> *Id.* at 1312. The Eleventh Circuit's panel discussion in *Lozman* included the Seventh Circuit as also part of the inter-circuit conflict. *See City of Riviera Beach v. That Certain Unnamed Gray*, 649 F. 3d 1259, 1267 (11th Cir. 2011) (citing *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012, 1016 (7th Cir. 2006)), which held that a riverboat casino was a vessel for purposes of admiralty tort jurisdiction, though stationary for the previous two years, but left opened the possibility, for exploration on remand, that it may be deemed "permanently moored" if its owner intends that it will never sail again.

<sup>50</sup> See the cases cited *supra* note 25.

## II. *LOZMAN*: CERTIORARI, ORAL ARGUMENT, AND HAVING FUN

In *Lozman*, decided only eight years after *Stewart*, the Court achieved none of these things. It introduced a test for vessel status which does not obviously provide an answer to any of these questions. In fact, the totality of the circumstances surrounding the Court's review of *Lozman*, from the granting of certiorari, to oral argument and the published opinion, and even after the case was decided when Chief Justice Roberts made some rare and revealing public comments about the Court's posture towards the case, suggests an unusual degree of levity and carelessness in the Court's handling of the substantive issues. This levity and carelessness, I will suggest, was a compliment to, and reinforcement of, the Court's implicit acceptance of a strategy, in reviewing the case, to "normalize" admiralty law alongside other areas of federal law.<sup>51</sup>

### A. *The Granting of Certiorari*

In the Petition for Certiorari, the Petitioner *Lozman* provided the Court with standard grounds for granting certiorari on the Eleventh Circuit case: evidence of an inter-circuit conflict.<sup>52</sup> The conflict was clear enough,<sup>53</sup> though the fact that such a conflict exists is hardly a sufficient, and commonly not even a necessary, condition for the Supreme Court to grant certiorari on a case.<sup>54</sup> The Court's actual

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<sup>51</sup> See *infra* Part IV.

<sup>52</sup> See Petition for Writ of Certiorari at 8, *Lozman* (No. 11-626), 2011 WL 5834670 (quoting *City of Riviera Beach*, 649 F.3d at 1267):

[T]he Eleventh Circuit openly acknowledged that the Fifth and Seventh Circuits have adopted different tests for determining whether a structure is a "vessel," "both of which focus on the intent of the shipowner rather than" the structure's potential ability to move or be towed across water. . . . But, the Eleventh Circuit explained that in *Belle of Orleans* it had squarely "rejected the reasoning of the Fifth and Seventh Circuits."

<sup>53</sup> See *supra* notes 43–49 and accompanying text.

<sup>54</sup> See Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 316–24 (discussing the various factors that figure into Supreme Court Justices' voting to grant certiorari on a case.) See also Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 441–49

reasons for ultimately granting certiorari in particular cases are never made public, and given that its choices in granting certiorari are completely unconstrained by Court procedure or substantive federal law, they often reflect the idiosyncratic preferences of the Justices.<sup>55</sup>

Those preferences in the *Lozman* case are not immediately clear, but from the perspective of the long history of the Supreme Court's vessel status cases, as well as the general purposes of federal admiralty law, there were strong reasons *ex ante* for the Court to decline certiorari on *Lozman*. First, the floating structure at issue in the case was never an instrument of maritime commerce<sup>56</sup>—a significant fact, given that one of the fundamental purposes of the original constitutional grant of admiralty and maritime jurisdiction to the federal courts is the protection and facilitation of maritime commerce.<sup>57</sup> The Petitioner *Lozman*'s floating structure did not participate in, or significantly affect, maritime commerce for the entirety of the period in which he owned it. *Lozman*'s long-running disputes with the city

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(discussing the divergent views of Supreme Court Justices regarding the relative importance of resolving conflicts among the circuits.).

<sup>55</sup> See Cordray & Cordray, *Setting the Social Agenda*, *supra* note 54, at 318 (quoting Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 255 (1973)) (“With this unfettered discretion, the Justices are free to select cases on any basis, constrained ‘solely by their individual notions of what is important or appropriate for review by the Court.’”).

<sup>56</sup> Though it was used in maritime commerce in the incidental and trivial sense that it was towed several times around the Florida coast. See *Lozman*, 133 S. Ct. at 739.

<sup>57</sup> See *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 15 (2004) (quoting *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)) (“The fundamental interest giving rise to maritime jurisdiction is ‘the protection of maritime commerce.’”) The Supreme Court has in fact considered six cases involving non-commercial floating structures; two of the most significant are *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982) (holding that a collision between two small pleasure boats in a Louisiana river was within admiralty tort jurisdiction), and *Yamaha Motor Corp., U.S. A. v. Calhoun* (holding that there was federal admiralty jurisdiction over a harbor crash between a jet ski and a ship). These have, however, been met with substantial scholarly criticism. See, e.g., David W. Robertson, *Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court*, 29 J. MAR. L. & COM. 275, 279 (1998) (noting that “to knowledgeable observers, the two decisions in combination are ridiculous, and they have left the lower courts confronting a ridiculous array of once-manageable questions.”).

of Riviera Beach, which the lower courts discussed primarily as a set of landlord-tenant issues,<sup>58</sup> and their potential resolution by the Court, did not obviously bear any connection to the most general purposes of federal admiralty law.<sup>59</sup> Second, the *res* in question was arguably *sui generis*, a custom-made “floating shack, built out of plywood with only 1/16” of fiberglass surrounding its unraked hull, without proper cleats for towing, no bilge pumps, no navigation aids, no lifeboats and other lifesaving equipment, no propulsion, [and] no steering,”<sup>60</sup> and so not appreciably similar to any floating structure that might be used in maritime commerce.<sup>61</sup> It was thus far from clear *ex ante* what value *any* analysis by the Court regarding the vessel status of this structure would have for the lower courts, to owners of borderline cases of vessels such as floating casinos, to insurers of those structures, and many others, in deciding whether a particular craft was a vessel and thus potentially subject to the admiralty jurisdiction of the federal courts.

#### B. *The Myth of Lozman as an Unimportant Case*

It may be thought—and the Court may have been lead to think in granting certiorari—that *Lozman* was a case which essentially hinged on merely a definitional question of the meaning of the word “vessel” in the U.S. Code, and therefore that the case is a minor, technical one which does not merit much attention. This was at least one general scholarly assessment offered after the case was decided.

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<sup>58</sup> See *City of Riviera Beach*, 648 F.3d at 1263, where the Eleventh Circuit discusses the City’s “notice of eviction” issued to Lozman, and that in prior eviction proceedings in state court, the City argued that the dockage agreement “established a nonresidential tenancy under Florida Law.”

<sup>59</sup> See *infra*, pp. 27–28.

<sup>60</sup> This is the descriptive gloss given of Lozman’s floating structure in the Eleventh Circuit’s opinion. See *City of Riviera Beach*, 649 F. 3d at 1269. The court further described the structure as “unusual,” (*Id.*) “unorthodox,” (*Id.*) and an “unusually designed craft” (*Id.*). Justice Sotomayor later pointed out in her dissent, *Lozman*, 133 S. Ct. at 753, that “a surveyor was unable to find any comparable craft for sale in the State of Florida.”

<sup>61</sup> See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 533 (1995) (citing *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982)) (“We conceded that pleasure boats themselves have little to do with the maritime commerce lying at the heart of the admiralty court’s basic work[.]”).

“In many respects *Lozman* seems to those of us who are not admiralty specialists like a small case[.]”<sup>62</sup> Remarkably, even some admiralty specialists do not view the vessel status issue as particularly significant in general, and would presumably, by extension, not view *Lozman* as significant either.<sup>63</sup>

What is more alarming, however, is that the Chief Justice of the United States also seems to have shared this assessment, during and after the Court’s review of the case. In an interview at the Fourth Circuit Judicial Conference following the Supreme Court’s 2012–2013 term, Chief Justice John Roberts made some unusually extensive, extra-judicial remarks about the *Lozman* case. He was asked whether there were any cases from the past term which were noteworthy but had not received much media attention. Here is his response (I emphasize in bold the most important passages):

I think if you look at the cases we have out of seventy-seven – what, there are maybe a half dozen that people are going to be talking about at the panel discussions and things like that – but some of the others are, **the littler ones can be very fascinating. I think my favorite from the past term was a case called *Lozman***, which involved the question of, in admiralty jurisdiction, over what counts as a vessel. And

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<sup>62</sup> Frederick Schauer, *Analogy in the Supreme Court: Lozman v City of Riviera Beach, Florida*, 2013 Sup. Ct. Rev. 405, 410 (2013); See also *Id.* at 431–32 (“*Lozman* is not an important case. It may not even be an important admiralty case.”).

<sup>63</sup> See Schoenbaum, *supra* note 2, at 37 (“Fortunately in the overwhelming majority of cases, the problem of defining a vessel does not arise because the craft fits the common sense notion of the term as a structure built to transport goods and passengers over water.”); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 33 (2d ed. 1975) (stating that vessel status arises in litigation “once in a while” and is not “of great importance.”) David Robertson and Michael Sturley call these remarks “inexplicable” (David W. Robertson and Michael F. Sturley, *Vessel Status in Maritime Law: Does Lozman set a New Course?*, 44 J. MAR. L. & COM. 393, 395 n.14 (2013)), but the context for the remarks in each treatise make clear that these scholars think that the vessel issue, while obviously important, is insignificant in the sense that it is not frequently a subject of litigation given a broad consensus across both the admiralty bench and bar about what constitutes a vessel in wide range of legal contexts. Of course, these remarks were made before *Lozman* was decided, and whether the case has disturbed that broad consensus remains to be seen.

the law has a very broad definition of what a vessel is. And the way cases develop in the law, of course you have something that seems to fit not comfortably into either category. It was, depending on what side you were on, it was either a floating home or a houseboat. [Audience laughter.] And it was a residence that was attached to the shore more or less permanently, but which could be disengaged and would float and could be towed around. Again, the issue was whether it counted as a vessel or not. **It was one of those cases where a picture's worth a thousand words.** If you look at the picture of the thing on the water it very much looks like a house that got swept into the ocean somehow, rather than a boat that's underway, and that – the Court did hold that it was not a vessel. **But we had a lot of fun with it**, looking at the different characteristics, and posing a lot of interesting hypotheticals at the argument.<sup>64</sup>

Several aspects of these rare public comments by the Chief Justice are noteworthy. First, it is abundantly clear that Chief Justice Roberts' general approach to the case, consistent with the majority's, was that it was fundamentally about fitting Lozman's floating structure in one category ("vessel") or another ("not a vessel") by applying the "very broad" definition of "vessel" in 1 U.S.C. §3. This is likely the sort of thing Justice Kennedy referred to during oral argument of *Lozman* as "the law school game,"<sup>65</sup> i.e., of developing the boundaries of application of a definition by assaying a range of both intuitive and counter-intuitive cases. Second, in his associating the idea of "a picture's worth a thousand words" with the Court's reasoning and outcome of the case, Chief Justice Roberts echoes the majority's emphasis on what Justice Sotomayor repeatedly calls in

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<sup>64</sup> See Chief Justice John Roberts Remarks, Fourth Circuit Judicial Conference, June 29, 2013: <https://www.c-span.org/video/?313594-2/chief-justice-john-roberts-remarks> (my emphasis).

<sup>65</sup> Transcript of Oral Argument at 8, *Lozman v. The City of Riviera Beach, Florida*, 133 U.S. 735 (2013) (No 11-626) (Oct. 1, 2012) [hereinafter Transcript]. See *infra*, Part II.C.

her dissent mere “esthetic features,”<sup>66</sup> features which are, and always have been, irrelevant in determining vessel status. Third, the Chief Justice’s general disposition towards the case appears to be one of amusement. He describes *Lozman* as one of the Court’s “littler” cases of the term, though the sense in which he believes *Lozman* is a “little” case is not clear. The context of this remark within his full response suggests that he thinks it is a “little” case precisely *because* it required, in his view, merely entertaining far-fetched examples of possible vessels, and studying pictures of both *Lozman*’s floating home and of other vessels and non-vessels, and then making a determination on those bases. This seems to be the explanation for why the Court “had a lot of fun with it.”

The suggestions that the issue of what is and is not a vessel under federal admiralty law is relatively insignificant, and that a case hinging on that issue is likewise unimportant, are on their face absurd. But the fact that this was suggested by the Chief Justice of the Supreme Court of the United States is even more troubling. Even those who are not admiralty specialists can surmise that a vessel status determination may trigger the applicability of a large body of federal law, the consequences of which may be significant, indeed, dispositive.<sup>67</sup> The most obvious example is the distinctive admiralty *in rem* action, which by definition can be taken only against vessels.<sup>68</sup> Moreover, the applicability of a significant number of federal statutes also depends on the determination of vessel status, including

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<sup>66</sup> *Lozman*, 133 S. Ct. at 752 and 753 (Sotomayor, J., dissenting).

<sup>67</sup> It is also notable in this context that Chief Justice Roberts, while not perhaps a specialist in admiralty, has some experience in the area, and with questions of admiralty jurisdiction in particular. Nearly twenty years before *Lozman*, and well before the beginning of his tenure as Chief Justice, he represented Great Lakes Dredge and Dock Company in an important admiralty jurisdiction case before the Supreme Court. *Grubart*, 513 U.S. at 529. His arguments were ultimately persuasive. See Joseph Blocher, *Roberts’ Rules: The Assertiveness of Rules-Based Jurisprudence*, 46 *Tulsa L. Rev.* 431, 431–432 (2011) (discussing Chief Justice Roberts’ arguments as counsel in *Grubart* and his reliance on the Court’s acceptance of them in his later briefs as counsel in the Supreme Court).

<sup>68</sup> See *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 216 (1867) (holding that admiralty *in rem* actions can be brought only against vessels), later codified in the Supplemental Admiralty and Maritime Claims Rule C(1), 28 U.S.C.A. (2016) (authorizing an action in rem “to enforce any maritime lien” or “whenever a statute of the United States provides for a maritime action in rem of a proceeding analogous thereto.”).

the Maritime Lien Act,<sup>69</sup> the Oil Pollution Act,<sup>70</sup> the Ship Mortgage Act,<sup>71</sup> the Admiralty Extension Act,<sup>72</sup> and many others.<sup>73</sup>

But more generally, the claim that a case which defines the very subject matter of a well-entrenched and vast area of federal law—that is, a case which defines the very entities which that area of law explicitly governs—is somehow an “unimportant” or “little” case can hardly be sustained. It should be obvious, for example, that the cases which determine the definition (and therefore, the core set) of objects of other areas of federal regulation are not trivial or “little.” It has never been suggested that cases which answer such questions as “what is a security?,”<sup>74</sup> “what is a seizure?,”<sup>75</sup> “what is a supervisor?,”<sup>76</sup> “what is a major life activity?,”<sup>77</sup> and countless others, are minor cases of little consequence. A Supreme Court case in admiralty setting out the generally applicable definition of the primary maritime object of federal regulation is not relevantly different from these cases, cases which are generally regarded as of fundamental importance to whole bodies of federal regulation.

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<sup>69</sup> 46 U.S.C. §31341 (granting a maritime lien to a one who provides “necessaries to a vessel”), the statute which was the basis of the federal litigation in *Lozman*.

<sup>70</sup> 33 U.S.C.A. §§2701–2761 (regulating the discharge of oil by vessels on navigable waters).

<sup>71</sup> 46 U.S.C. §31322 (giving priority to certain mortgages covering “the whole of the vessel.”).

<sup>72</sup> 46 U.S.C. §30101 (extending admiralty jurisdiction to “cases of injury or damage, to person or property, caused by a vessel on navigable waters.”).

<sup>73</sup> See David Robertson, *Border Wars: Lozman v. City of Riviera Beach*, 11 BENEDICT’S MAR. BULL. 18 (2013) (discussing the various contexts in federal law in which vessel status is important).

<sup>74</sup> See *Reves v. Ernst & Young*, 494 U.S. 56 (1990) (defining “security” under the Securities Act of 1933 §2(1), 15 U.S.C. §77b(1) (2016)).

<sup>75</sup> See *Michigan v. Chestnut*, 486 U.S. 567 (1988) (defining “seizure” under the Fourth Amendment).

<sup>76</sup> See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (defining “supervisor” for purposes of determining employers’ vicarious liability for the unlawful actions of supervisory employees in Title VII hostile environment sexual harassment cases).

<sup>77</sup> See *Bragdon v. Abbott*, 524 U.S. 624 (1998) (defining “major life activity” under the Americans with Disabilities Act).

### C. *Oral Argument and Having Fun*

Chief Justice Roberts's extra-judicial comments that, in *Lozman*, the Court "had a lot of fun" with one of its "littler cases" indicate that the Court may have reviewed the case with an unusual degree of levity. This is further supported by certain aspects of how oral argument in the case proceeded, in which the Justices demonstrated a consistently unhelpful methodological approach to resolving the vessel status issue, and thereby revealed a shared sense that this was an insignificant case.

First, it was clear throughout the oral argument of *Lozman* that a majority of the Court were of the view that the case was to be resolved *merely* by an exercise in statutory interpretation, specifically by engaging in the narrow task of interpreting the word "vessel" in 1 U.S.C. §3, completely independently of the Court's prior vessel status cases. Almost immediately, Chief Justice Roberts indicated this. When Jeffrey Fisher, counsel for *Lozman*, began by arguing for a purpose-based test rooted in *Evansville*<sup>78</sup> and other cases, the Chief Justice responded: "Well, that just has—I understand the argument. It's got no connection whatever to the statutory language, right? . . . Capable is in the statute, purpose is not, right?"<sup>79</sup> Similar concerns about how only Section 3 applies, without any reference to earlier cases, were expressed by Justice Alito,<sup>80</sup> Justice Kagan,<sup>81</sup>

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<sup>78</sup> *Evansville*, 271 U.S. at 22 (the wharfboat "performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land.").

<sup>79</sup> Transcript at 5 (statement of Chief Justice Roberts).

<sup>80</sup> See Transcript at 11 (statement of Justice Alito) ("I just don't see how you can get purpose into this statutory language"); Transcript at 14 (statement of Justice Alito) ("I don't see how they get—how you get [purpose or indefinite mooring] into the words of the statute.").

<sup>81</sup> See Transcript at 40 (statement of Justice Kagan) ("You're reading the statute – you're reading the statute as if it says something can be transported over water. But the statute doesn't say that. It says something can be used or capable of being used as a means of transportation on water. So that – that the question is whether this thing is transporting other things over water, and whether that's its function; and in my hypothetical it's not its function. Its function is to serve as a house. That house happens to be on water, but it's just a house.").

Justice Kennedy,<sup>82</sup> and Justice Scalia.<sup>83</sup> There was even some mild hostility expressed by the Court towards its own vessel cases. While Fisher was arguing for a test based on function or purpose—he used the terms interchangeably—Justice Kagan interjected: “Well, then you’re not talking about purpose; you’re talking about function, right? You’re just using purpose as a kind of strange synonym for function.”<sup>84</sup> The strangeness of Fisher’s alleged equivocation she attributed to the Court’s line of vessel status cases: “So you are really talking about a function test. And you are using strange words, *because they come out of our opinions*—kind of not your fault.”<sup>85</sup>

Second, perhaps *because* the Court considered its role in the case as developing a workable interpretation of the word “vessel” under the statutory definition, and nothing more, it employed a method of interpretation which seemed naturally suited to the task. The method can be characterized as a species of *reductio ad absurdum*: start with a tentative definition proposed by counsel, then imagine some conceptually possible scenario which involves an object which would notionally fall under the proposed definition. If it does, and that application of the definition is intuitively objectionable, then the definition should be discarded and another one considered which does not extend to the imagined objectionable scenario; the new definition is then subjected to the same scrutiny by example and counter-example.

The rigorous application of this method by the Court had a particular effect on the course of oral argument: it devolved at times into the Justices suggesting a series of absurd, and seemingly irrelevant, putative counter-examples to various interpretations of 1 U.S.C. §3. David Frederick, counsel for Riviera Beach, who argued for something approaching an “anything-that-floats” test,<sup>86</sup> had to

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<sup>82</sup> See Transcript at 43 (statement of Justice Kennedy) (“Does it carry goods under the statute[?]”).

<sup>83</sup> See Transcript at 12 (statement of Justice Scalia) (“Can I ask about that definition? That definition comes from the Rules of Construction Act, right . . . which provides the meaning of all – of the word vessel as used in the United States Code. Okay?”).

<sup>84</sup> Transcript at 11 (statement of Justice Kagan).

<sup>85</sup> *Id.* at 14 (statement of Justice Kagan) (my emphasis).

<sup>86</sup> *Id.* at 31 (statement of David Frederick, Counsel for City of Riviera Beach, Florida) (“Our position is that the houseboat is a vessel under section 3 because it floats, moves, and carries people or things on water[.]”).

consider a total of ten such presumed counterexamples from the Court: an inner tube,<sup>87</sup> cup,<sup>88</sup> garage door,<sup>89</sup> an inner tube with pennies pasted on it,<sup>90</sup> a Styrofoam sofa,<sup>91</sup> a Styrofoam sofa carrying a coffee can,<sup>92</sup> a floating sofa carrying a cushion,<sup>93</sup> a floating advertising sign,<sup>94</sup> a trampoline,<sup>95</sup> a “kind of a log next to a beach somewhere,”<sup>96</sup> and a Polynesian boat in a museum.<sup>97</sup> Justice Breyer, who would later author the majority opinion, offered seven of the ten hypotheticals. With each example, the clearly intended purpose of introducing it was to suggest that the broad definition under consideration is overbroad, inappropriate, or otherwise unacceptable, because it encompassed the counter-intuitive example of a (possible) vessel.

Early in the proceedings, Justice Kennedy explained this style of questioning by remarking to Lozman’s counsel, Jeffrey Fisher, “you know the law school game.”<sup>98</sup> Later Justice Kennedy suggested that the Court was in search of a “universal definition” “of what a floating home is or is not, which would assist in deciding the case.”<sup>99</sup> As something like the statement of a methodology, this smacks of the old, *a priori* method of philosophical investigation made famous by Socrates as depicted in the dialogues of Plato from the fifth century BCE.<sup>100</sup> While this method of inquiry has a venerable history in philosophy and other disciplines, its relevance for answering questions of fundamental importance about federal law is not obvious.

Riviera Beach’s counsel, David Frederick, understandably seemed perplexed and even annoyed by the Court’s employment of

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<sup>87</sup> *Id.* at 31–32 (statement of Chief Justice Roberts).

<sup>88</sup> *Id.* at 32 (statement of Justice Breyer).

<sup>89</sup> *Id.* (statement of Justice Sotomayor).

<sup>90</sup> *Id.* (statement of Justice Kagan).

<sup>91</sup> *Id.* at 36 (statement of Justice Breyer).

<sup>92</sup> *Id.* at 37 (statement of Justice Breyer).

<sup>93</sup> *Id.* at 39 (statement of Justice Breyer).

<sup>94</sup> *Id.* at 44 (statement of Justice Breyer).

<sup>95</sup> *Id.* at 46 (statement of Justice Sotomayor).

<sup>96</sup> *Id.* at 51 (statement of Justice Breyer).

<sup>97</sup> *Id.* at 24 (statement of Justice Breyer).

<sup>98</sup> *Id.* at 8 (statement of Justice Kennedy).

<sup>99</sup> *Id.* at 17 (statement of Justice Kennedy).

<sup>100</sup> See Gregory Vlastos, *The Socratic Elenchus*, 1 OXFORD STUD. OF ANCIENT PHIL. 27 (1983) (discussing the method of argument and refutation employed by Socrates in Plato’s early dialogues).

this method and the repeated proposal of many practically irrelevant and ridiculous examples. While respectfully attempting to respond to each, he twice offered a pragmatic rebuttal to the esoteric line of questioning. In response to Justice Kagan's pennies-on-the-inner-tube hypothetical, Frederick responded: "Justice Kagan, I—I think we could imagine all kinds of de minimis types of hypotheticals that would satisfy the basic criteria. But what the Court in *Stewart* said was practical capability as viewed *in a real world sense*."<sup>101</sup> And, again, in response to Justice Breyer's floating-sofa-carrying-a-cushion example: "I think I've given up the absurd hypos *because there [is] no litigation on them*."<sup>102</sup> These are surely the correct responses to this absurd and inexplicable line of questioning by the Court.

### III. *LOZMAN V. THE CITY OF RIVIERA BEACH, FLORIDA*

The substance of the Court's 7-2 opinion in *Lozman* reflects the same general trajectory of concern and argument which it demonstrated during oral argument, particularly with respect to the following three assumptions: (1) that providing an interpretation of 1 U.S.C. § 3 was the only task before them in the case,<sup>103</sup> (2) that an interpretation of 1 U.S.C. § 3 should be arrived at primarily by reflecting on various imaginary examples of possible vessels, however absurd, in order to test the soundness of their interpretation, and that (3) the prior Supreme Court cases and those in the Circuits addressing vessel status are in themselves of little or no relevance in carrying out this task.

#### A. *The Majority's Opinion*

Justice Breyer wrote for the 7-2 majority.<sup>104</sup> The Court began by not just limiting its starting point to determining the meaning of 1

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<sup>101</sup> *Id.* at 33 (statement of David C. Frederick, Counsel for City of Riviera Beach, Florida) (emphasis added).

<sup>102</sup> *Id.* at 39 (statement of David C. Frederick, Counsel for City of Riviera Beach, Florida) (emphasis added).

<sup>103</sup> *Lozman*, 133 S. Ct. at 739. *See also* Robertson and Sturley, *supra* note 63, at 445 ("The majority began by recognizing that it was deciding a statutory construction case.").

<sup>104</sup> *Lozman* was only the second majority opinion in admiralty jurisdiction he has authored while a Justice of the Supreme Court. The other was *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997) (holding that an admiralty tort plaintiff cannot recover for physical damage a defective product causes to the

U.S.C. §3, but characterized the locus of interpretation even narrower, by focusing “primarily upon the statutory phrase ‘capable of being used . . . as a means of transportation on water.’”<sup>105</sup> It immediately disagreed with the Eleventh Circuit’s interpretation as “too broad,” which lead to the conclusion that Lozman’s floating structure was a vessel merely because it could float, could proceed under tow, and its shore connections did not render it “practically incapable of transportation or movement.”<sup>106</sup> The Court continued its fixation, carried on from oral argument,<sup>107</sup> in contemplating absurd counterexamples to demonstrate the inadequacy of the Eleventh Circuit’s interpretation of the statute. That interpretation was incorrect, the Court said, because it would also confer vessel status on “a wooden washtub, a plastic dishpan, a swimming platform on pontoons, a large fishing net, a door taken off its hinges, or Pinocchio (when inside the whale).”<sup>108</sup> To avoid these *prima facie* absurd consequences, the Court stated that it must “apply this definition in a ‘practical,’ not a ‘theoretical,’ way.”<sup>109</sup> The Court here cites *Stewart*

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product itself, but for damage the product causes to other property.) *Lozman* was the seventh admiralty opinion Justice Breyer had authored in his (up to that time) thirty-three year career as a federal judge. As a judge on the First Circuit Court of Appeals (1980–1994), he authored five opinions in admiralty. All upheld the judgments of the lower district court, and ranged from two and a half to seven pages in length. *See* *Jordan v. U.S. Lines, Inc.*, 738 F.2d 48 (1st Cir. 1984) (affirming judgment of the district court in favor of defendant against an unseaworthiness claim); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985) (affirming judgment of the district court in favor of defendant against a claim of pure economic loss caused by oil spill); *Cerqueira v. Cerqueria*, 828 F.2d 863 (1st Cir. 1987) (affirming judgment of the district court in favour of defendant against claim for damages based on unseaworthiness, the Jones Act, and maintenance and cure); *Lyon v. Ranger III*, 858 F.2d 22 (1st Cir. 1988) (affirming judgment of the district court in admiralty allocating fault according to comparative negligence principles of Massachusetts law in a wrongful death action under general maritime law); *Butler v. American Trawler Co., Inc.*, 887 F.2d 20 (1st Cir. 1989) (affirming the district court’s finding of admiralty tort jurisdiction).

<sup>105</sup> *Lozman*, 133 S. Ct. at 739.

<sup>106</sup> *Id.* at 740 (quoting *Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F.3d 1259, 1266 (2011)).

<sup>107</sup> *See supra*, Part II.

<sup>108</sup> *Lozman*, 133 S. Ct. at 740.

<sup>109</sup> *Id.* at 741 (quoting *Stewart*, 543 U.S. at 496).

for support of this constraint, but in fact this use of the practical/theoretical distinction is altogether different than the one at work in *Stewart*, where the Court stated: “The question remains in all cases whether the watercraft’s use ‘as a means of transportation on water’ is a practical possibility or merely a theoretical one.”<sup>110</sup> In *Stewart*, the practicality was in reference to the possibility of a craft *being used* as a means of water transport. In *Lozman*, the practicality now qualifies the *application of the Section 3 definition* as a whole. Whereas in *Stewart* the Court aimed to interpret Section 3 as applying to watercraft in which its use as a means of transportation over water was a practical, that is, a *real* possibility and not merely a conceptually possible one, the Court in *Lozman* is seeking a definition that can be “practically,” that is, *sensibly* or *pragmatically*, applied across a given range of cases. This equivocation on “practical,” which allows a creative appropriation of *Stewart*, is a further indication of the *Lozman* Court’s narrowing of the substantive legal issue even further to one of only statutory construction, rather than attempting, as the *Stewart* Court does, a holistic and coherent approach which aims to make the Section 3 interpretation consistent with and intelligible in terms of the long line of Supreme Court vessel cases stretching back to the late nineteenth century.

With this brief introduction in *Lozman*, the majority proceeds by setting out the following new test for vessel status under Section 3:

[A] structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the [structure’s] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.<sup>111</sup>

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<sup>110</sup> *Stewart*, 543 U.S. at 496.

<sup>111</sup> *Lozman*, 133 S. Ct. at 741. The Court later suggests that this test “should offer guidance in a significant number of borderline cases where ‘capacity’ to transport over water is in doubt.” *Id.* at 745. But there is no indication in the formulation of the reasonable observer test, nor elsewhere, that the Court intends for it to be applied *only* in borderline cases, but rather that it is set forth as a *general* test for vessel status, which will be of particular guidance in borderline cases. That the general test will offer guidance in borderline cases is merely a foreseeable (and, in the Court’s view, desirable) consequence of its promulgation. *See generally id.* at 741.

As Justice Sotomayor notes, correctly, in her dissent,<sup>112</sup> this test not only has no basis in any vessel status case the Court, or even any of the circuits, have ever decided; it has no basis *in any admiralty case* in the history of the Court or the circuits.<sup>113</sup> Besides its lack of basis in the Court's precedent, the test has the additional *prima facie* weakness that it makes use of what some legal scholars have called an "extravagantly vague" term—here the notion of a *reasonable* observer—which inherently admits of such broad application that it runs the risk of incoherence and consequently failing to guide behaviour.<sup>114</sup> It is no surprise then that the remainder of the Court's

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<sup>112</sup> *Id.* at 748, 751 (Sotomayor, J., dissenting). See also, *infra*, Part III.B.

<sup>113</sup> The only appearance of a "reasonable observer" test in the history of Supreme Court jurisprudence has been in a line of Establishment Clause cases, obviously a context far removed from the concerns of admiralty law. See, e.g., *Witers v. Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring) ("No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief."); *Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989) ("While an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish . . . the constitutionality of its effect must also be judged according to the standard of a 'reasonable observer.'"); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) ("[W]hen the reasonable observer would view a government practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid.") (emphasis in original); *Van Orden v. Perry*, 545 U.S. 677, 707 (2005) (Stevens, J., dissenting) ("Viewed on its face, Texas' display . . . does [not] provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization."). The Court's reasonable observer test in the Establishment Clause context has been met with sharp scholarly criticism and has been difficult to implement in the lower courts. See B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1413–18 (2014) (discussing the problems with the reasonable observer test in Establishment Clause cases); Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky and Van Orden v. Perry*, 4 FIRST AMEND. L. REV. 139, 149 (2006) (same); Benjamin I. Sachs, *Whose Reasonableness Counts?*, 107 YALE L.J. 1523, 1524–25 (1998) (same).

<sup>114</sup> See Timothy Endicott, *The Value of Vagueness*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 14, 18 (Andrei Marmor & Scott Soames, eds., 2011).

When law-makers use vague language in framing standards, they typically use extravagantly vague language such as 'neglected' or 'abandoned' or 'reasonable'. The resulting vagueness in the law can generate serious and deep disputes over the

discussion is taken up with attempting to coherently carve out a set of features which ought to be taken as relevant to the reasonable observer, and the presence of which in a structure will therefore ground a determination of vessel status.

The features of Lozman's floating structure which the Court found relevant to finding that it was not a vessel included that it had "no rudder or other steering mechanism[.]"<sup>115</sup> "[i]ts hull was unraked,"<sup>116</sup> that "it had a rectangular bottom 10 inches below the water[.]"<sup>117</sup> it had "no special capacity to generate or store electricity" and had to receive electricity via connections to land,<sup>118</sup> its rooms "looked like ordinary nonmaritime living quarters[.]"<sup>119</sup> and from within, a person looked out from those quarters "not through watertight portholes, but through French doors or ordinary windows."<sup>120</sup> Moreover, while not dispositive, the structure "lack[ed] self-propulsion" and was towed "on only four occasions over a period of seven years."<sup>121</sup> These features suggest that the structure was not "design[ed] to transport over water anything other than its own furnishings and related personal effects."<sup>122</sup>

Despite the fact that the "reasonable observer" test and its application to the *res* in *Lozman* were both unprecedented, the Court nonetheless asserted that its interpretation of Section 3 "is consistent with its text, precedent, and relevant purposes."<sup>123</sup> The Court's language here is not entirely clear, especially when reading the Court's

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principles of the standard in question. Because it may allow different, incompatible views as to the nature of the standard and the principles of its application (even among sincere and competent interpreters), it leads to the danger that its application will be incoherent. By that I mean that decision made in purported application of the norm will not be intelligible as the application of a single norm—a standard that can regulate behaviour. *Id.*

<sup>115</sup> *Lozman*, 133 S. Ct. at 741.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (citing *The Robert W. Parsons*, 191 U.S. 17, 31 (1903)).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

previous Section 3 interpretation. At first glance, the pronoun referring to the statute (“its”) ranges over all three considerations, such that the Court’s claim is that its interpretation of Section 3 is consistent with the text of Section 3, only the precedent *applying* Section 3, and the relevant *purposes* of Section 3. But what the court seems to have meant is that their interpretation is consistent with its text, the “bulk of”<sup>124</sup> its vessel status precedent (regardless of whether that precedent interpreted Section 3),<sup>125</sup> and “the purposes of major federal maritime statutes,” rather than only with the purpose of Section 3.<sup>126</sup> In regards to the text of Section 3, the Court maintained that its interpretation was consistent with it, even given its broad language of referring to “every description of watercraft or other artificial contrivance.”<sup>127</sup>

To support its contention that the “reasonable observer” interpretation of Section 3 is consistent with “the bulk of precedent,” the Court considers only three of its six previous cases regarding vessel status.<sup>128</sup> The Court suggests that its finding that Lozman’s floating structure is not a vessel is consistent with *Evansville*, in which the Court held that a wharfboat was not a vessel, even though, similar to the structure in *Lozman*, “[it] floated next to a dock,” was used “to transfer cargo from ship to dock and ship to ship,” was connected to the dock by cables, utility lines, and a ramp, and not only was capable of being towed, but was towed annually.<sup>129</sup> Additionally, the Court cites *Stewart* as consistent with its conclusions, since the dredge in *Stewart* had, but the structure in *Lozman* lacked, “a captain and crew, navigational lights, ballast tanks, and a crew dining area.”<sup>130</sup> Finally, the Court compares its determinations in *Cope*,

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<sup>124</sup> *Id.* at 742.

<sup>125</sup> For example, the Court considers *The Robert W. Parsons*, *Cope*, and *Grubart*, none of which even mention the Section 3 definition of “vessel.” *See, e.g., The Robert W. Parsons*, 191 U.S. 17, 31 (1903); *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 625 (1887); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535 (1995).

<sup>126</sup> *Lozman*, 133 S. Ct. at 743.

<sup>127</sup> *Id.* at 741 (quoting 1 U.S.C. § 3) (2012)) (emphasis in original).

<sup>128</sup> *Id.* at 741–43.

<sup>129</sup> *Id.* at 742 (citing *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 46 (1926)).

<sup>130</sup> *Id.* (quoting *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 484 (2005)).

finding that a floating drydock was not a vessel because it was permanently affixed to a wharf,<sup>131</sup> and *Grubart*, finding that a barge sometimes used for transportation was a vessel,<sup>132</sup> as consistent with its conclusion in *Lozman* in relying on the consideration that, unlike the barge in *Grubart*, *Lozman*'s floating structure was not regularly, nor primarily, used for transportation purposes.<sup>133</sup> Suffice it to say that the Court's engagement with its own precedent is perfunctory, at least as compared with its usual practice in admiralty cases. Less than a decade earlier, for example, the Court in *Stewart* showed considerably more attention to precedent, citing a total of thirty-one cases in the course of its majority opinion. The *Lozman* court cited only twenty-two cases, a decrease of nearly one-third as compared to *Stewart*; the majority cited only one more case than Justice Sotomayor cited in her dissent.<sup>134</sup>

The Court also maintained that their finding of no vessel status on the basis of the "reasonable observer" test was consistent with "the purposes of major federal maritime statutes."<sup>135</sup> The Court cites as examples the attachment procedure established by the Federal Maritime Lien Act,<sup>136</sup> the purpose of which is to allow plaintiffs to seize a vessel as a security interest for "provision of 'necessaries to a vessel'" given the possibility that the vessel may sail away to escape liability,<sup>137</sup> and the Limitation of Liability Act,<sup>138</sup> which "can encourage shipowners to engage in port-related commerce."<sup>139</sup> Because the Petitioner *Lozman* "cannot easily escape liability by sailing away in his home" and "does not significantly engage in port-

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<sup>131</sup> *Id.* at 743 (citing *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 627 (1887)).

<sup>132</sup> *Id.* (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock. Co.*, 513 U.S. 527, 535 (1995)). The Court in *Grubart*, however, offered no reasoned argument as to why the barge was a vessel, as that finding was never challenged by Petitioners in the case. *Grubart*, 513 U.S. at 535 ("Petitioners do not here seriously dispute the conclusion of each court below that the Great Lakes barge is, for admiralty tort purposes, a 'vessel.'").

<sup>133</sup> *Lozman*, 133 S. Ct. at 743.

<sup>134</sup> *See infra*, Part III.B.

<sup>135</sup> *Lozman*, 133 S. Ct. at 743–44.

<sup>136</sup> *See id.* *See also* 46 U.S.C. §§ 31341–31343 (2012).

<sup>137</sup> *Id.* at 739 (citing 46 U.S.C. § 31342 (2012)).

<sup>138</sup> *See* 46 U.S.C. § 30505 (2012).

<sup>139</sup> *Lozman*, 133 S. Ct. at 744.

related commerce[.]”<sup>140</sup> there is little reason to classifying his floating structure as a vessel.<sup>141</sup>

Regarding the brief attention given to the purpose of federal maritime *statutes*, it is worth noting one thing the Court declined to do, which is to ask the broader question of whether the introduction of the unprecedented “reasonable observer” test and its application which rendered Lozman’s floating structure not a vessel, served the purposes of *the whole* of federal maritime law, including both statutes and general maritime law. If the Court would have recalled that the “‘fundamental interest’ giving rise to maritime jurisdiction is ‘the protection of maritime *commerce*[.]’”<sup>142</sup> the claim that Lozman did not significantly engage in port-related commerce would have suggested a more palatable resolution to the case. It would have been much more consistent with its precedent for the Court to reason that Lozman’s floating structure *was* a vessel under the broad Section 3 definition, but that nonetheless there was no federal interest in applying federal law in the case. For example, the Court could have found that the dispute between Lozman and the City of Riviera Beach was “maritime but local,” and therefore that Florida state law should apply,<sup>143</sup> just as it had in prior proceedings in Florida state

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<sup>140</sup> *Id.*

<sup>141</sup> The factual assertions here are dubious at best. As the Court acknowledges, Lozman *could* sail away and did in fact do so several times, albeit under tow; moreover, Lozman was engaged in standard maritime commercial activity in being party to a dockage agreement with the city of Riviera Beach. *See Lozman*, 133 S. Ct. at 739.

<sup>142</sup> *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004) (quoting *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)).

<sup>143</sup> *See W. Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921) (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917)), where the Court held that an admiralty action for the wrongful death of a longshoreman killed while working on an anchored ship in San Francisco Bay was barred by California’s one-year statute of limitations on the ground that:

The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

court between Lozman and Riviera Beach.<sup>144</sup> Or it could have held that Florida's interest in regulating dockage agreements between a city and the owner of a structure that functions as the owner's floating home outweighs any federal interest in regulating them.<sup>145</sup> Or the Court could have declined to apply federal law in order to "accommodate" the local, state interest in regulating the dispute.<sup>146</sup> Or the Court could have resorted to the more general and entrenched *Jensen* test, according to which Florida law could apply because it did not "contravene[] the essential purpose expressed by an act of Congress" or "interfere[] with the proper harmony and uniformity of that law in its international and interstate relations."<sup>147</sup> This sort of argument would have avoided the need to fashion a new interpretation of 1 U.S.C. § 3 from whole cloth, and would have expressed, arguably more coherently in regards to the body of federal maritime

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*See also* Robertson & Sturley, *supra* note 63, at 432 (describing the dispute between Lozman and the City of Riviera Beach, prior to the granting of certiorari, as "a local human-interest story with an eccentric cast of characters[.]").

<sup>144</sup> *See* City of Riviera Beach v. Lozman, 649 F.3d 1259, 1263 (11th Cir. 2011).

<sup>145</sup> An approach suggested in *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 628 (1st Cir. 1994) (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 738–42 (1961) ("Where substantive law is involved, we think that the Supreme Court's past decisions yield no single, comprehensive test as to where harmony is required and when uniformity must be maintained. Rather, the decisions however couched reflect a balancing of the state and federal interests in any given case.")).

<sup>146</sup> *See Kossick*, 365 U.S. at 739 (citations omitted):

[T]he fact that maritime law is—in a special sense at least—federal law and therefore supreme by virtue of Article VI of the Constitution, carries with it the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant. But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern. Surely the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.

<sup>147</sup> *Jensen*, 244 U.S. at 216.

law, the Court's judgment that federal law should not be concerned with Lozman's floating structure and ones like it. However, because the Court saw its task from the beginning as merely giving an interpretation of a statutory definition, these strategies and arguments were not salient, and so *ab initio* foreclosed.

A final, distinctive aspect of the Court's opinion which has not been noted, much less discussed, in the scholarly treatments of the case<sup>148</sup> is the Appendix, in which the Court attached a photo of the floating structure at issue in the case, as well as a 1928 photo of a wharfboat similar to the one from *Evansville*, on which the Court also declined to confer vessel status.<sup>149</sup> The Court's inclusion of photographs of a floating structure, or of any sort of maritime apparatus, is unprecedented in admiralty, and the purpose of including them in this case is far from clear.<sup>150</sup> It has been cogently argued that the Court's general practice of attaching photographs to its opinions is fraught with problems.<sup>151</sup> In this regard, *Lozman* is no exception. The observation that "[v]isual attachments are much more likely to

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<sup>148</sup> For example, in an otherwise exhaustive discussion of the *Lozman* litigation, the Appendix to the Court's opinion is mentioned only in passing. See, e.g., Robertson, *supra* note 63, at 417 n.140.

<sup>149</sup> See *Lozman*, 133 S. Ct. at 747–48.

<sup>150</sup> Prior to *Lozman*, no attachment of any sort (photograph, map, replica, reproduction, etc.) has ever been included in a Supreme Court majority opinion in admiralty. In only one other admiralty case, *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 605 (1991) (Stevens, J., dissenting), in which the Court had to determine whether the plaintiffs were given fair notice of a forum-selection clause which appeared on their passage contract tickets, Justice Stevens in his dissent reproduced images of the ticket as part of his argument that notice was not reasonable. *Id.*

<sup>151</sup> See Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704, 1753 (1997) (citation omitted):

The legal documents that have bound and bettered our nation—from the Declaration of Independence to *Brown v. Board of Education*—have been plain and unencumbered, yet clear and powerful. A review of the Supreme Court's use of photographs, maps, replicas, and reproductions shows the items generally to be incompatible with such ideals . . . Unless the Court is willing to adopt measures to enhance the accuracy of visual attachments, or at least disclose their inherent distortions, this unnecessary practice should stop.

obscure the best available legal answer rather than reveal it”<sup>152</sup> is particularly apt here. The photographs present a limited, two-dimensional perspective on the structures, from which little information can be gleaned concerning their relevant physical characteristics (especially their subsurface features which cannot be seen, but would provide important details as to design, structure, and possible uses). Nor is the relevance, value, or intended use of these pictures ever explained by the Court. The inclusion of the pictures in the majority’s opinion is even more baffling upon examination of the occasions and purposes for which they are cited. Some of the allegedly relevant features of the two floating structures mentioned in the opinion are not even depicted in the photographs. For example, in the initial description of the *res* at issue in *Lozman*, the Court lists “a sitting room, bedroom, closet, bathroom, and kitchen, along with a stairway leading to a second level with office space. An empty bilge space underneath the main floor kept it afloat.”<sup>153</sup> None of these features appear in the attached photograph; indeed, given the physical dimensions of the structure, it would be difficult or impossible for all these features to be captured in a single photograph. Moreover, some of the features for which the photographs are intended to be illustrations cannot be depicted *at all*. In citing the photograph of a 1928 wharfboat similar to the one at issue in *Evansville*, the majority cited such supposedly relevant characteristics as that it was ““not used to carry freight from one place to another,”” and that it did not ““encounter perils of navigation to which crafts used for transportation are exposed.””<sup>154</sup> These features cannot, even in principle, be represented in a synchronic two-dimensional representation of the structure, since the characteristics are diachronic and relational (e.g., by making implicit reference to the activities of those employed on it, as well as the nature and frequency of navigational activity in the waters adjacent to the structure).

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<sup>152</sup> *Id.*

<sup>153</sup> *Lozman*, 133 S. Ct. at 739 (citations omitted).

<sup>154</sup> *Id.* at 742 (quoting *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926)).

Justice Breyer once characterized himself, in reference to his judicial method, as “a bringer of chaos.”<sup>155</sup> In *Lozman*’s majority opinion, he delivered. The “reasonable observer” test purports to respond to a narrow problem of statutory construction, but consequently reflects a blinkered view of over a century of precedent which addresses both vessel status and the appropriateness of applying (or choosing not to apply) federal maritime law to a maritime dispute that is primarily of local, state concern. The result is a vague standard which offers limited guidance (if any) to lower courts and the many private actors in national and international maritime industries.

### B. Justice Sotomayor’s Dissent

In contrast to the majority’s *ex nihilo* reasoning, Justice Sotomayor *does* dwell at greater length in her dissent on the Court’s vessel status precedent, as well as that of the circuits, perhaps in light of the Court’s acknowledgement in *Stewart* that 1 U.S.C. § 3’s definition of “vessel” “merely codified the meaning that the term ‘vessel’ had acquired in general maritime law.”<sup>156</sup> She seems to go further, by intimating that she fundamentally disagrees with the way the majority has characterized its task in the case, i.e., to engage only in an exercise of statutory construction of the Section 3 definition. She states that “several important principles have guided both this Court and the lower courts in determining what kinds of watercraft fall properly within the scope of admiralty jurisdiction,”<sup>157</sup> and yet all of the principles she identified are rooted in the Court’s vessel status jurisprudence and bear no fundamental relationship to Section 3 or any other federal statute.

Of the majority’s “reasonable observer” test, Justice Sotomayor said pointedly: “This phrasing [“reasonable observer”] has never appeared in any of our cases.”<sup>158</sup> This is a polite way of saying that the

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<sup>155</sup> GARRETT EPPS, AMERICAN JUSTICE 2014: NINE CLASHING VISIONS ON THE SUPREME COURT 97 (2014) (citations omitted).

<sup>156</sup> *Stewart v. Durtra Constr. Co.*, 543 U.S. 481, 490 (2005). This explicit reference to the general maritime law is the only reference to it found in *Lozman*, either in the majority opinion or dissent. See *Lozman*, 133 S. Ct. at 742.

<sup>157</sup> *Lozman*, 133 S. Ct. at 749 (Sotomayor, J. dissenting).

<sup>158</sup> *Id.* at 751 (Sotomayor, J. dissenting).

majority is *just making stuff up*. She repeatedly criticized the inexplicable, *a priori* approach the majority took to developing the test, an approach that is patently inconsistent with developing admiralty law in the manner of a common law court, by drawing on the principles found in the Court's own cases, as it has done for two centuries:

Certainly, difficult and marginal cases will arise. Fortunately, courts do not consider each floating structure anew. So, for example, when we were confronted in *Stewart* with the question whether a dredge is a § 3 vessel, we did not commence with a clean slate; we instead sought guidance from previous cases that had confronted similar structures . . . . In sum, our precedents offer substantial guidance for how objectively to determine whether a watercraft is practically capable of maritime transport and thus qualifies as a § 3 vessel.<sup>159</sup>

As a result of “commenc[ing] with a clean slate[,]” the majority’s test has “render[ed] the § 3 inquiry opaque and unpredictable”<sup>160</sup> and “completely malleable.”<sup>161</sup> By impliedly overruling many early cases on vessel status, “the majority works real damage to what has long been a settled area of maritime law[,]”<sup>162</sup> and “will confuse the lower courts and upset our longstanding admiralty precedent.”<sup>163</sup>

She agreed with the majority’s criticism of the Eleventh’s Circuit’s test as overbroad, and conceded that subjective intention should “play no role in the vessel analysis of 1 U.S.C. § 3,”<sup>164</sup> but suggested that the Court’s reasoning “despite its seemingly objective gloss, effectively (and erroneously) introduces a subjective component into the vessel-status inquiry.”<sup>165</sup> The subjectivity arises

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<sup>159</sup> *Id.* at 750–51 (Sotomayor, J. dissenting) (citations omitted).

<sup>160</sup> *Id.* at 750–52 (Sotomayor, J. dissenting).

<sup>161</sup> *Id.* at 753 (Sotomayor, J. dissenting).

<sup>162</sup> *Id.* at 753 (Sotomayor, J., dissenting) (citing *The Ark*, 17 F.2d 446, 447 (S.D. Fla. 1926)).

<sup>163</sup> *Id.* at 755 (Sotomayor, J., dissenting).

<sup>164</sup> *Id.* at 748 (Sotomayor, J., dissenting).

<sup>165</sup> *Id.* at 751 (Sotomayor, J., dissenting).

from the majority's unexplained emphasis on what Justice Sotomayor calls merely "esthetic elements" of Lozman's floating structure, like "French doors" and "ordinary windows," which have "no relationship to maritime transport."<sup>166</sup> She suggests that if such elements really are relevant under the "reasonable observer" test, then the majority has not explained why they are relevant to the Section 3 inquiry, and is therefore essentially suggesting an "I know it when I see it" standard.<sup>167</sup> Her criticism of the majority's multiple references to the *prima facie* irrelevant "esthetic" elements of Lozman's floating structure, as support for their application of the "reasonable observer" test, is consistent with my earlier criticisms as to the uselessness and irrelevance of the photograph of the floating structure included in the Appendix of the majority opinion.<sup>168</sup>

#### IV. THE "NORMALIZATION" OF ADMIRALTY LAW: A PRIMER

There has been considerable scholarly reaction to the Court's reasoning in *Lozman*, much of it critical, and discussion of the possible practical consequences of the case for various sectors of maritime commerce.<sup>169</sup> As we have seen, the case is unusual in several

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<sup>166</sup> *Id.* at 751–752 (Sotomayor, J., dissenting).

<sup>167</sup> *Id.* at 751–52 (Sotomayor, J., dissenting) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

<sup>168</sup> *See supra*, Part III.A.

<sup>169</sup> *See, e.g.*, Stewart F. Peck & David B. Sharpe, *What is a Vessel?: Implications for Marine Finance, Marine Insurance, and Admiralty Jurisdiction*, 89 TUL. L. REV. 1103, 1104–07 (2015); Daniel Faessler, *Defining a Vessel in Admiralty: "I Know It When I See It"*, 26 ST. THOMAS L. REV. 248, 248 (2014); J. Neale deGravelles, *Uncertainty in Vessel Status After Lozman v. Riviera Beach, Florida: An Analysis and Review of Recent Developments*, 14 LOY. MAR. L. J. 56, 73 (2014); Robertson & Sturley, *supra* note 63, at 394; Megan C. White, Comment, *Back in the Same Boat: Vessel Status after Lozman v. City of Riviera Beach*, 7 CHARLESTON L. REV. 559, 601–03 (2013); Caroline E. Frilot, Comment, *Crisis Averted: The Supreme Court Rejects a Subjective Vessel Status Test in Lozman v. City of Riviera Beach, Florida*, 38 TUL. MAR. L.J. 215, 229–30 (2013); Kenneth G. Engerrand, *Vessel Status Reconsidered*, 11 LOY. MAR. L. J. 213, 267–70 (2013); Lindsey C. Brock III, *The Practical Effects of Lozman*, 38 TUL. MAR. L.J. 89, 101–02 (2013); Kathryn Yankowski, Comment, *Whatever Floats the "Reasonable Observer's" Boat: An Examination of Lozman v. City of Riviera Beach, Fla. and the Supreme Court's Ruling That Floating Homes Are Not Vessels*, 67 U. MIAMI L. REV. 975, 997 (2013); Raul J. Chacon Jr. & Adam T. Ferguson, *All That Floats is Not a Boat: The Supreme Court's Lozman Decision Makes Waves Impacting Multiple Areas of Law*, TRIAL ADVOC. Q., Summer 2013, at 11; David

respects: the dubious *ex ante* case for granting certiorari,<sup>170</sup> the exceptional facts of the case (including the uniqueness of the floating structure at issue) vis-à-vis the normal concerns of federal admiralty law, the course of the oral argument,<sup>171</sup> the Court's fashioning a new vessel status test completely independently of its own line of cases extending back over a century,<sup>172</sup> and the subsequent public, extra-judicial comments<sup>173</sup> made about the case by the Chief Justice. My aim in the remainder of the Article is to suggest that these aspects of the case are best understood as indications of a trend towards the Supreme Court transforming its role in its capacity as an admiralty court, by abdicating its traditional and constitutionally mandated duty to engage broadly in federal common lawmaking in admiralty. The Court is increasingly showing a preference to see itself as "sail[ing] in occupied waters,"<sup>174</sup> that is, to allow Congress to take the lead in creating substantive law in the area, and then to make law only when necessary, to fill in gaps created by federal statute with little regard for the long history of its cases being the primary source of law in admiralty.<sup>175</sup>

According to some scholars who have developed sophisticated views expressing familiar concerns about separation of powers and federalism in relation to the Court's traditional role in admiralty,<sup>176</sup> these are welcome developments. In this section, I first summarize these views, which suggest that federal admiralty law should be "normalized" and treated like most other areas of federal law, with respect to the scope of the lawmaking powers of the federal courts.<sup>177</sup> In the next section, I show that the otherwise inexplicable aspects of *Lozman* which I have discussed, are explained by the Court's implicit preference for normalization and, moreover, that

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R. Maass, Comment, *If It Looks Like a Vessel: The Supreme Court's "Reasonable Observer" Test for Vessel Status*, 65 FLA. L. REV. 905–06 (2013).

<sup>170</sup> See *Lozman*, 133 S. Ct. at 740.

<sup>171</sup> See Transcript of Oral Argument, *supra* note 77 at \*2, 5, 8.

<sup>172</sup> See *Lozman*, 133 S. Ct. at 749.

<sup>173</sup> See Chief Justice John Roberts Remarks, *supra* note 64.

<sup>174</sup> *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990) ("We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will . . .").

<sup>175</sup> See generally *id.* at 27,36–37.

<sup>176</sup> See, e.g., *The Last Brooding Omnipresence*, *supra* note 3, at 1350.

<sup>177</sup> See, e.g., *It's Just Water*, *supra* note 11, at 480.

the vices of *Lozman* reflect the corresponding vices of a normalization approach in admiralty cases. In that sense, while a general, systematic critique of normalization deserves its own independent discussion, *Lozman* nonetheless serves as a *pragmatic* argument against normalization of admiralty. In this case, at least, the implementation of a normalization approach by the Court, an approach which served as a set of background assumptions about the proper method of judicial decision on the vessel status issue, lead to a number of independently undesirable results. Before elaborating further on those, however, I first turn to the substantive arguments for the normalization of federal admiralty law.

Over the last two decades, several federal courts scholars, and especially Ernest Young in a series of articles, have argued that the federal courts' long-practiced federal common lawmaking powers in admiralty, independent of Congressional action, are unconstitutional.<sup>178</sup> The argument begins with, and largely rests on, a particular understanding of the original constitutional grant.<sup>179</sup> The central claim is that both the Article III grant, extending the judicial power to "all cases of admiralty and maritime jurisdiction,"<sup>180</sup> along with its statutory counterpart, the Judiciary Act of 1789, extending "original cognizance of all civil causes of admiralty and maritime jurisdiction" on the federal district courts<sup>181</sup> are merely *jurisdictional* grants, and neither the Constitution nor the Judiciary Act make any

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<sup>178</sup> See, e.g., *The Last Brooding Omnipresence*, *supra* note 3, at 1357–58; see also Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 291 (1999) [hereinafter *Preemption at Sea*]; *It's Just Water*, *supra* note 11, at 476–77; Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1655–67 (2008) [hereinafter *Preemption and Federal Common Law*]. Others have argued along broadly similar lines. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1341–60 (1996) (arguing that federal courts may not make federal common law regarding private maritime claims); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 894–95 (1986) (arguing against most forms of federal common law, including admiralty); Martin H. Redish, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 146–47 (2d ed. 1990) (arguing for the complete abolition of the "so-called 'law of the sea'") (citation omitted).

<sup>179</sup> See Field, *supra* note 171, at 890–91.

<sup>180</sup> U.S. CONST. Art. III, § 2.

<sup>181</sup> The Judiciary Act, ch. 20, 1 Stat. § 9 (1789) (codified as amended at 28 U.S.C. § 1333 (2012)).

reference to substantive lawmaking power.<sup>182</sup> The federal courts' power to make federal law in admiralty would therefore presumptively be subject to the same limitations on their power to make law in other areas of federal law.

Those limitations were established in *Erie Railroad Co. v. Tompkins*, which held that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State . . . . There is no federal general common law.”<sup>183</sup> The result was what has been called the “new federal common law,”<sup>184</sup> in which federal courts are empowered to make federal common law in a very narrow range of cases: either in cases in which doing so would protect a “uniquely federal interest,”<sup>185</sup> or those in which Congress has overtly or implicitly delegated to the Court the authority to fill in the gaps of federal statutory schemes.<sup>186</sup> The post-*Erie* world is therefore one in which, as Justice Holmes famously remarked, “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign. . . that can be identified.”<sup>187</sup> And, so the argument goes, from the point of view of a sound federalism, this is just as it should be, since in the courts' most common task of interstitial lawmaking, “Congress has made the primary legislative judgment in such cases and the states are politically represented in that process.”<sup>188</sup> The argument for the normalization of admiralty law claims that this is precisely what is lacking in the making of general federal common law in admiralty: “In admiralty . . . courts generally make law wholly apart from any

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<sup>182</sup> See *Preemption and Federal Common Law*, *supra* note 171, at 1672–73.

<sup>183</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), *overruling* *Swift v. Tyson*, 41 U.S. 1, 18–19 (1842) (holding that, absent an applicable state statute, the federal courts were free to develop general federal commercial law sitting in diversity jurisdiction).

<sup>184</sup> See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421–22 (1964).

<sup>185</sup> See *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)).

<sup>186</sup> See *D’Oench, Duhme & Co., Inc. v. Fed. Deposit Ins. Corp.*, 315 U.S. 447, 470 (1942).

<sup>187</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

<sup>188</sup> *The Last Brooding Omnipresence*, *supra* note 3, at 1353.

federal statute, and the separation of powers and federalism problems [of Congressional guidance and state representation] become more compelling.”<sup>189</sup>

It is ironic, but not coincidental, that when Justice Holmes railed against the “brooding omnipresence” of federal common law,<sup>190</sup> he was writing on the losing side of an admiralty case decided twenty-one years before *Erie, Southern Pac. Co. v. Jensen*,<sup>191</sup> in which the Court held that federal general maritime law, i.e., law made by the Court independently of Congress, pre-empted state legislation on the grounds that:

[N]o such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.<sup>192</sup>

Thus, *Jensen* sets out a strong, and clear, default rule of maritime pre-emption according to which judicially-made federal maritime law (in the language of *Jensen*, “the general maritime law”) will standardly pre-empt state law, regardless of whether it is statutory or common law.<sup>193</sup> *Jensen* remains good law,<sup>194</sup> and subsequently, the Court stressed the irrelevance of the *Erie* doctrine in the realm of admiralty law.<sup>195</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> *Jensen*, 244 U.S. at 222 (Holmes, J., dissenting).

<sup>191</sup> *Id.* at 205.

<sup>192</sup> *Id.* at 216.

<sup>193</sup> *See id.*

<sup>194</sup> *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 447 n.1 (1994) (“[W]e think it inappropriate to overrule *Jensen* in dictum, and without argument or even invitation.”).

<sup>195</sup> *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410–11 (1953) (holding that general maritime law, and not state common law, governed a maritime tort claim, regardless of whether the case was brought in admiralty, diversity, or some other basis). *See also* Joel K. Goldstein, *Federal Common Law in Admiralty: An Introduction to the Beginning of an Exchange*, 43 ST. LOUIS U. L. J. 1337, 1344 (1999) (noting some scholars have summarized the Court’s position in *Pope* as “the *Erie* limitation [does] not apply at sea.”); Theodore F. Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246, 270 (1950) (internal citations omitted):

However, according to the argument for the normalization of admiralty law, since the legitimacy of the Court's reasoning in *Jensen* rests on a number of dubious assumptions, *Jensen* was wrongly decided and is therefore unconstitutional.<sup>196</sup> Examination of the originalist arguments regarding the fundamental purpose of the Article III admiralty grant shows that the Framers primarily had in mind certain categories of (now rare) public law cases, such as prize and capture cases and piracy, and though they almost certainly were aware that the grant would cover private maritime claims,<sup>197</sup> this falls far short of the view that the Court is vested with the power to make substantive admiralty rules independent of Congress, much less establishes the strong pre-emption principle of *Jensen*.<sup>198</sup> Moreover, on an originalist understanding of the general maritime law in the Founding era, it was derived from the law of nations and so not properly characterized as either state or federal law.<sup>199</sup> From this

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*Erie R.R. v. Tompkins* rests solely upon the principle that state courts should have the power to determine the scope and effectiveness of rights created by the states in the exercise of their Constitutional powers. Similarly, admiralty courts, through the federal judicial power conferred by the Constitution, have adopted or created a certain body of legal principles, which, regardless of their source, must be uniformly applied. It may be that this is merely another form of 'federal common law' masquerading under a title of the general maritime law. If this is true, so long as a state will provide a jurisdiction in which its residents may seek a common law remedy, it becomes even more apparent that federal diversity courts are not bound by *Erie R.R. v. Tompkins* on maritime issues.

Stevens was writing before *Pope* was decided.

<sup>196</sup> See *The Last Brooding Omnipresence*, *supra* note 3, at 1362. This may be overstating the strength of Young's conclusion, for one way to read his argument suggests that *Jensen* is simply out of step with the *modern* rule allowing the preemption of state law by federal statute (*Id.* at 1356). However, the subsequent historical argument (*Id.* at 1357–63) he makes implies that *Jensen*, when decided, relied on a number of illicit historical fictions. See *id.*

<sup>197</sup> See Jonathan M. Guthoff, *Admiralty, Article III, and Supreme Court Review of State-Court Decisionmaking*, 70 TUL. L. REV. 2169, 2178 n.25 (1996).

<sup>198</sup> See *The Last Brooding Omnipresence*, *supra* note 3, at 1358–60.

<sup>199</sup> See *id.* at 1360.

perspective, the significance of *Jensen* is that it “essentially federalized the general maritime law[.]”<sup>200</sup> But if so, then the original Article III grant, or the 1789 Judiciary Act, cannot be read as implicit delegations of federal lawmaking authority to the federal courts.<sup>201</sup> Finally, in regards to *Jensen*’s explicit call for uniformity “in its international and interstate relations[.]”<sup>202</sup> coupled with the implied assumption that the Supreme Court is best suited to create and maintain that uniformity, the reply in favor of normalization is that worries about uniformity are overstated in admiralty and are no more serious than in other areas of federal law, particularly those that have some connection to foreign affairs, and federal statutes have proven to be means just as effective in bringing about the desired degree of uniformity.<sup>203</sup>

The argument for normalization has several other twists and turns which, for present purposes, need not detain us. Young usefully encapsulates the normalization approach this way:

Judge-made federal common law is legitimate because of—and only to the extent of—its connection to democratic enactments; most of the general maritime law’s applications, however, cannot meet this standard. *Preemption* by judge-made law is even more problematic than simple common lawmaking; given our system’s primary reliance on Congress as the protector of state regulatory prerogatives, preemption is extremely difficult to justify in the absence of legislative action.<sup>204</sup>

#### V. LOST AT SEA: *LOZMAN* AND THE VICES OF NORMALIZATION

The argument that admiralty law should be “normalized” vis-à-vis other areas of federal law is clearly complex and turns out to include a number of interdependent claims regarding the legitimacy

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<sup>200</sup> *It’s Just Water*, *supra* note 11, at 485.

<sup>201</sup> *See id.*

<sup>202</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

<sup>203</sup> *See Preemption at Sea*, *supra* note 171, at 305–06.

<sup>204</sup> *Id.* at 277 (emphasis in original).

or illegitimacy of federal common lawmaking powers of the Supreme Court,<sup>205</sup> the extent to which federal common law in admiralty should displace state law,<sup>206</sup> and the proper understanding of the relation between the general maritime law and federal admiralty statutes, among others.<sup>207</sup> The case for the normalization of admiralty is a powerful one, but I believe it is ultimately mistaken in several fundamental aspects. A comprehensive critique of it, however, will have to wait for another occasion.<sup>208</sup> I have introduced the normalization argument because it is an illuminating lens through which to view the oddities of *Lozman*. The case, in turn, helps illuminate why normalizing admiralty law, whether or not justified by concerns of federalism and separation of powers, is *pragmatically* objectionable, since it tends to produce bad outcomes (along a number of familiar metrics, such as certainty, clarity, and predictability) when the Court adopts the tenets of normalization as part of its judicial methodology in admiralty cases.<sup>209</sup>

First, and most importantly, the implicit adoption of the normalization approach by the Court explains its overwhelming focus in *Lozman*, throughout both the oral argument and the majority's opinion, on 1 U.S.C. §3, the only Congressional enactment of relevance in the case. It also explains the corresponding scant attention the Court paid to its own line of vessel status cases, which extends back to the nineteenth century,<sup>210</sup> indeed a line of cases older than the 1873 Section 3 statutory definition.<sup>211</sup> The implicit acceptance of a normalization approach also explains the lack of attention given in

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<sup>205</sup> See *id.* at 281. See also David J. Sharpe, *Admiralty Jurisdiction: The Power Over Cases*, 79 TUL. L. REV. 1149, 1160–61 (2005).

<sup>206</sup> See *id.* at 305–06.

<sup>207</sup> See *id.* at 318.

<sup>208</sup> Suffice it to say the view has attracted a fair amount of critical discussion. See David W. Denton, Jr., *Lifting "The Great Shroud of the Sea": A Customary International Law Approach to the Domestic Application of Maritime Law*, 37 TUL. L. REV. 1, 22–23 (2012); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 617–19 (2006); Sharpe, *supra* note 205, at 1160–61; Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 535–38 (2004); Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 375–86 (2000).

<sup>209</sup> See generally Gutoff, *supra* note 193, at 379–84.

<sup>210</sup> See, e.g., *Crapo v. Kelly*, 83 U.S. 610, 631–32 (1872).

<sup>211</sup> See, e.g., *Greeley v. U.S.*, 21 U.S. 257, 257 (1823).

the case to the general purposes of a definition of “vessel” in the broader context of federal admiralty law (whether that law is statutory or judge-made), in particular to the fact that a vessel status test is only one among many used to determine admiralty jurisdiction in a given case, whether the test is otherwise provided by statute,<sup>212</sup> or is a test which has been developed by the Court independently of Congress.<sup>213</sup> This myopic exercise in statutory construction makes sense only on the presumption that the limits of the Court’s common lawmaking powers are determined by prior Congressional action, which is precisely one of the core claims in the argument for normalization.<sup>214</sup>

Second, a presumption in favor of normalizing admiralty would begin to explain why the Court granted certiorari on *Lozman* in the first place. Despite the many compelling reasons there were against the Supreme Court taking the case,<sup>215</sup> if the Court viewed its role *ex ante* as resolving an intra-circuit conflict centered only on *the interpretation of a definition provided by a federal statute*, then the uniqueness of *Lozman*’s floating structure would rather count *in favor* of, and not against, the granting of certiorari. *Merely* interpreting a statute invited the court to play “the law school game,” as Justice

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<sup>212</sup> See, e.g., Admiralty Extension Act, 46 U.S.C. § 30101(a) (2012) (extending admiralty jurisdiction to “cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.”)

<sup>213</sup> See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (holding that a tort must occur on navigable waters for admiralty tort jurisdiction, which requires that the incident could have “a potentially disruptive impact on maritime commerce” and that the “general character” of the “activity giving rise to the incident” shows a “substantial relationship to traditional maritime activity.”) (citations omitted).

<sup>214</sup> See Chief Justice Roberts Remarks, *supra* note 64. These remarks by Chief Justice Robert’s involve another non-admiralty case decided in the same (2012–2013) term as *Lozman* and regarded the proper role of the federal judiciary in regard to the constitutionality of same sex marriage. See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (“Federal courts have authority under the Constitution to answer such questions only if necessary to do so in the course of deciding an actual ‘case’ or ‘controversy’ . . . . This is an essential limit on our power: It ensures that we act as *judges*, and do not engage in policymaking properly left to elected representatives.”) (emphasis in original). While itself a fairly standard conservative call for judicial restraint, it also aptly characterizes the Court’s approach in deciding *Lozman*.

<sup>215</sup> See *supra* Part II.

Kennedy called it,<sup>216</sup> and, as we have seen, that game requires imagining far-fetched and often absurd examples to test the appropriateness of a definition; in fact, the more far-fetched, the better. The novelty of *Lozman*'s floating structure gave the court an *actual* far-fetched case to consider. Therefore, the otherwise irrelevant "floating home" in controversy *facilitated*, rather than hindered, the quasi-Socratic, definitional "game" of throwing up for consideration imaginary examples and counter-examples.

Third, the apparent levity with which the Court decided the case can also be explained by an implicit adoption of the strategy of normalization of admiralty law. In so far as the Court was taking up a normalizing role in *Lozman*, and mostly setting aside its earlier cases, as well as a comprehensive approach to protecting maritime commerce, it would make sense that Chief Justice Roberts would characterize the case as one of the Court's "littler" ones. The task of interpreting a single word in a statute is admittedly a more modest one as compared to a case within a complex statutory environment (e.g., at the intersection of immigration and criminal law),<sup>217</sup> or a case involving a controversial political issue (e.g., same-sex marriage).<sup>218</sup>

And yet, just as the Court's implicit commitment to normalizing admiralty provides useful context for understanding *Lozman*, its many objectionable aspects are likewise attributable to it being a decisive step in the direction of normalization. The case in fact demonstrates the *pragmatic* difficulties, and troublesome consequences, of attempting to make admiralty "normal" in relation to the rest of federal law and the Court's powers in shaping it. The normalization project amounts to the Court abandoning its traditional and constitutionally mandated duty under Article III to fashion rules and principles of decision for maritime disputes. These judicially-crafted rules and principles have been reasonably stable and consistent for

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<sup>216</sup> See Transcript, *supra* note 65, at 8.

<sup>217</sup> See, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1686–87 (2013) (holding that a non-citizens arrest for intent to distribute marijuana was not for an aggravated felony under the Immigration and Nationality Act).

<sup>218</sup> See *Hollingsworth*, 133 S. Ct. at 2663, 2667–68 (holding the Petitioner did not have standing to appeal ruling in lower court on the constitutionality of California's Proposition 8, a referendum on same-sex marriage).

decades, in many cases for centuries, and normalization has the potential to profoundly disrupt that stability. In *Lozman*, as the latest example of a dramatic escalation in normalizing admiralty, that potential became a reality, and with undesirable consequences. The result of implicitly endorsing normalization in the case was an unpredictable and blind act of deference to federal statute, which then made it possible for the Court to engage in irrelevant reasoning over a range of trivial and absurd examples. That reasoning then produced an unprecedented, *ex nihilo* test for vessel status, a test which provides little guidance to lower courts, and one which will continue to confound those in the private sectors which make up the vital national and international economy of maritime trade.

An advocate for normalizing admiralty may respond that a pragmatic argument against it, even if valid on its own terms, is surely outweighed by the more entrenched values of safeguarding federalism and maintaining separation of powers:

While pragmatic concerns enter into constitutional law in a number of contexts, the fact that a particular legal regime is more efficient or represents better policy will rarely save an otherwise unconstitutional law. The Constitution frequently chooses other values—such as democracy, decentralization, and checks and balances—over efficiency, and nowhere is this more accurate than in the fields of federalism and separation of powers.<sup>219</sup>

The response to this argument is that what is at stake in *Lozman* is not merely increased efficiency. The concerns motivating this Article's criticisms regarding how the Court handled the case, from beginning to end, lie elsewhere. The examination of *Lozman* reveals a failure of the Court to rise to the occasion of reasonably granting certiorari and reviewing cases with the requisite amount of seriousness. The case also demonstrates a failure in providing certainty and regularity for all those parties frequently subject to the admiralty law of the United States. These latter concerns of certainty and regularity are at least as deeply rooted in the American legal tradition as are the values of federalism and separation of powers. Certainty and

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<sup>219</sup> *The Last Brooding Omnipresence*, *supra* note 3, at 1362.

regularity are both traditional core components of the ideal of the rule of law, surely a political value which advocates on either side of the normalization debate, and across the political spectrum, can embrace.<sup>220</sup> For the Court to abruptly shift to a normalization approach in the late twentieth and early twenty-first century is to risk compromising certainty and regularity on each and every occasion in which it acts in its unique capacity as the American High Court of Admiralty. The long-term benefits of such a shift (if indeed there are any) are not yet clear; in any case, the principled constitutional arguments for normalization have not yet taken account of the worries expressed here regarding the upholding of rule of law values, as well as the Court exercising a requisite amount of seriousness and propriety in reviewing admiralty cases.

#### CONCLUSION

The kinds of complaints made in this Article about the apparent efforts of the Supreme Court to “normalize” federal admiralty law, on full display in *Lozman*, are not unprecedented. A quarter century ago, Judge John R. Brown anticipated the dangers of the Court implementing a process of normalization in admiralty. In criticizing the Court’s reasoning in *Miles v. Apex*,<sup>221</sup> he identified the erosion of not only the technical expertise of our only national admiralty court, but also the increasing tendency for the Court to essentially abdicate its Article III responsibility to develop and maintain a coherent body of federal law to govern maritime disputes, and instead to let Congress take the lead.<sup>222</sup> As we have seen in the *Lozman* case,

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<sup>220</sup> See, e.g., FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 208–09 (1960) (discussing how predictability in law promotes individual liberty by protecting a sphere of unimpeded private action); JOHN RAWLS, *A THEORY OF JUSTICE* 207 (Rev. ed. 1999) (discussing the rule of law as requiring the regular and impartial application of public rules).

<sup>221</sup> 498 U.S. 19, 21 (1990).

<sup>222</sup> See Brown, *supra* note 7, at 282:

The decision of the Supreme Court to bar recovery of nonpecuniary damages in an unseaworthiness claim under the general maritime law, based on the olds statute providing a negligence remedy which was enacted under Congress’ power to regulate commerce, leads to the most strained preemption holding ever reached by an American admiralty judge. In essence, the *implied* effect of the *implied* provision in a statute enacted under

that tendency has become even more pronounced and with problematic results.

The current prevailing political and ideological orientation of the Court is likely to change significantly during the Trump administration, and it remains to be seen the consequences of those changes for the future of federal admiralty law. Those changes will determine whether the Court will continue to unjustifiably narrow its own power with respect to the Article III grant of admiralty jurisdiction, or whether it will return to its traditional and constitutionally prescribed role of making rules of decision in admiralty in the manner of a common law court.<sup>223</sup> If the Court opts for the former alternative, and continues in the trend of normalization, there are likely rough waters ahead.

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an *implied* power of Congress served to eliminate a remedy declared by the admiralty judges of the Supreme Court in exercise of their power conferred directly by Constitution.

(emphasis in original). See also Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide (Part II)*, 28 J. MAR. L. & COM. 555, 590 (1997) (noting the Supreme Court's "recent retreat from its role of expositor of general maritime law.>").

<sup>223</sup> See Young, *supra* note 3, at 1360–61.