Introduction

I can pinpoint almost to the hour when my thoughts first turned to the subject of this book: Thursday morning, October 9, 1986. I was a law clerk for Justice Powell, and the Supreme Court had heard arguments the previous day in an obscure bankruptcy case captioned *Kelly v. Robinson*, in a month in which the Court also heard arguments in the landmark *McCleskey v. Kemp* (1987), which upheld the constitutionality of the death penalty despite statistical evidence of a pervasive racial bias. The issue in *Kelly* was whether a bankruptcy filing discharged the debtor's obligation to pay restitution imposed as part of a criminal sentence. I had worked hard preparing for this case and had provided the Justice with a detailed bench memorandum explaining my view that the language of the statute compelled the conclusion that the bankruptcy discharge absolved the debtor of the obligation to pay restitution. The basic point was that restitution is compensatory in nature and thus is not properly considered a "penalty" exempted from discharge under Bankruptcy Code Section 523. Because I had focused on commercial law courses in my law school studies, including multiple courses involving the Bankruptcy Code, I felt well qualified to examine the question. My confidence was buttressed by the knowledge that the other eight law clerks working on the case shared my view, including, among others, Dan Bussel (now a successful bankruptcy professor at UCLA) and my colleague at Columbia Eben Moglen.

I was anxious and excited when I entered the Justice's office to discuss the case. It was the first argued case I had discussed with him, and so I did not know what to expect. As always, he was most gracious. He had read my memorandum with care, annotating it throughout. He waited patiently and attentively through my brief presentation summarizing my views of the statute. When I was finished, he smiled and nodded approvingly. He then told me that he was sure my statutory analysis was meticulous, but that he was just as sure that his colleagues would not decide that a bankruptcy court had the power

to absolve a state criminal sentence. I left his office doubtful at best that he could be right – the statute seemed so clear.

Not surprisingly, the expectations of the Justice were more accurate than those of his young law clerk. At the conference the next morning, the Justices decided by a 7–2 margin that the Bankruptcy Code did not discharge the restitutionary obligation. The opinion was assigned to Justice Powell. His opinion explained that the tradition of federal deference to the state criminal process was so important that only the clearest possible language could convince the Court that Congress intended to interfere with the enforcement of the sentence of a state criminal court. Because the language of Section 523 was not incontrovertible, the Court concluded that the Bankruptcy Code should not be interpreted to interfere with the state criminal process. Justice Marshall, joined by Justice Stevens, offered a stinging dissent emphasizing the stark tension between the Court's conclusion and the plain language of the statute. Despite what I regarded (and still regard) as its direct inconsistency with the language of the Code, the decision sank like a small pebble into the United States Reports, leaving not a ripple of controversy.[1]

Kelly is a useful starting point not only because of its prominence in my professional consciousness but also because it underscores the themes that have motivated me to write this book focusing on how the Justices interpret the Bankruptcy Code. Perhaps the easiest answer, the one I hear most commonly in conversations with other lawyers who have clerked at the Court, is that the Justices don't care about these cases: they didn't become judges to interpret obscure provisions of federal statutes like the Bankruptcy Code. They are there for the big questions: the First Amendment, the death penalty, abortion, affirmative action, gay marriage, and the other leading issues of the particular era in which they serve. Probably the most famous example of this perspective is the oft-cited anecdote in which Justice Blackmun complained about receiving an undue share of tax cases, which he regarded as "dogs" (Wasby 1993, 70–71).

But the "they just don't care" explanation withstands little scrutiny. For one thing, it seems inconsistent with my own personal experience – admittedly anecdotal. If the Justices did not care about these cases, why would they take the trouble (as in *Kelly*) to reject the advice of their clerks? The path of

[1] Justice Marshall did, in a sense, get the last word. When a similar question (the dischargeability of restitution orders in Chapter 13 cases) reached the Court several years later in *Pennsylvania v. Davenport* (1990), Justice Marshall wrote for the Court, limiting *Kelly* and holding that those orders can be discharged in Chapter 13 (over the objection of Justices Blackmun and O'Connor from the *Kelly* majority). I discuss *Kelly* and *Davenport* in more detail in Chapter 9.

least resistance in such cases would be to accept the legalistic resolution of the controversy and agree to a brief opinion explicating that point (presumably largely written by law clerks). The attention of the Justices to these cases is evident from Justice Powell's notes, added in red down the side of his conference notes in an early environmental bankruptcy case: "None of us has a clear rationale for deciding this case. I've rarely heard such divergent and unclear views by all of us" (OKOV002).

But Justice Powell's correct expectation that the Court would pay no heed to the settled view of the law clerks at least suggests a principled framework for issue resolution. Whatever that framework is (and that is the central topic of this book), it is the antithesis of apathy. Indeed, the *Kelly* anecdote suggests a framework far removed from abject submission to the text of the statute. To put it another way, saying that the Justices don't care about a particular class of cases tells us nothing about how they decide them: Whether they are important or not, the Court still reaches decisions in those cases. What this book attempts to understand is how they reach those decisions in bankruptcy cases. If there is a discernible pattern of issue resolution in bankruptcy cases, that suggests that the Justices do care about those cases. More empirically, the case studies that occupy the bulk of this book demonstrate that the Justices in fact care deeply about these cases. The files are replete with back-and-forth negotiations about the precise wordings of opinions, changes of position after the initial decision, and substantial changes in doctrinal approach over time. Those are not the features of apathetic and disinterested decisionmaking.

My project, then, is to open up the black box of the Court's decisionmaking, to understand as best as I can what the Court actually does when it decides cases under statutes like the Bankruptcy Code. The core of the book is a set of case studies analyzing several of those cases in detail. For each of those cases, I have collected all of the available papers of the Justices (which I have cataloged, imaged, and archived online at www.bksct.net). I have collected all of the briefs of the parties and as much as I can locate of the records of proceedings in the lower courts. I have corresponded with law clerks that worked on each of those cases. Finally, I have searched news archives for information about the parties to the dispute, all with a view to developing as rich and broad an understanding as possible of the disputes, the competing policy interests, and how the Justices resolved them. It is my hope that the case narratives proceed at four distinct though overlapping levels. Collectively, the different levels of analysis reflect the different goals I hope the project advances.

- At the highest level of generality, I am trying to show where courts look for knowledge in an area in which positive law provides little guidance

and where political preconceptions have little power or salience. As Posner (2010, 47) emphasizes, this is an important question for the still underexamined topic of judicial reasoning. As I explain in Chapter 2, it also advances the extensive literature on the Court's decisionmaking.

- At a second level, the case studies illustrate how courts interpret statutes when they have limited guidance from reliable external sources. By moving beyond the simple labels of "textualist" and "purposive" to a narrative that provides a richer institutional framework, I hope this study advances conceptions of statutory interpretation.
- At the level of bankruptcy policy, the primary focus of the book's narrative, the case studies show how the Court's decisions systematically have underenforced the Bankruptcy Code. Faced with ambiguous statutory language and a conflict with other state, federal, or constitutional interests, the Court in almost every close case has ruled against a broad application of the Bankruptcy Power. Given the increased importance of appropriate responses to financial distress in our ever-more volatile economy, the infirmity of the Court's bankruptcy instincts have handicapped the Code's ability to fill the constitutional role set out for it. The view that the bankruptcy system should play a powerfully positive view in our society is of course not a common one. It is not, however, completely unprecedented, as a glance at the recent work of David Skeel (2009) will demonstrate.
- Finally, at the lowest level of generality, the narratives of the individual cases are compelling. From the shockingly toxic pollution presented in *Midlantic* to the rare-coin fraud behind *BFP*, the Court's bankruptcy cases provide a fascinating glimpse at the world of commercial and financial failure.

A brief word about the authorship of the project is also appropriate. Loring Veenstra worked extensively on Chapters 7, 8, and 10. For that reason he is listed as the coauthor of those chapters and the collaborator on the book as a whole. He bears no responsibility for any errors of judgment or omissions in the remainder of this work.