Preface

THIS BOOK CONSISTS of a series of case studies and essays illustrating clashes between the branches of the American government. The separation of power between the three branches of federal government, and between federal and state authority, allows each level of government to apply advantages unique to itself. The arrogation of power by a branch in a manner crossing over those divisions exposes the comparative disadvantages of the arrogating branch and calls for vigorous resistance by the branch upon which the encroachment has occurred. Such encroachments are more common than the comparative silence of the branches would indicate, as a result of which, comparative advantages of the branches have been distorted and lost.

I do not advocate any specific policy outcome in any topic. In the examples developed in this text, I do, strongly, advocate that the Court stick to interpreting the intent of Congress and the vindication of constitutional principle; that Congress spend its time determining and upholding the policy preferences of the people, while not forgetting that its members, too, are bound by an oath to uphold and defend the Constitution; and that the president utilize the flexibility of the executive branch to fit statutory and administrative law to practical circumstances, while ceasing to encroach on the powers explicitly given to Congress, as in declaring war. The federal government, as an entity, needs to recognize the plenary power vested in the states, reaching, for example, the issue of life's beginning and end, as well as the specific powers reserved to the states under the Constitution, including regulating militia. I reach these conclusions independent of the policy out-

come that I or any reader might prefer, asking only whether resort to a particular branch or level of government is more appropriate than resort to a different branch, from the point of view of the inherent structural advantages of each. If that is the case, then it is my hope that the branch inappropriately engaged will desist, or that, if necessary, the other branches or levels of government will be able to force it to desist, in order that the matter be resolved through the apportionment of responsibilities intended by the Constitution and most consistent with the abilities of each branch.

I was on leave of absence from my position as professor of law at Stanford University to serve as a U.S. congressman from 1989 to 1993, as a California state senator from 1993 to 1995, and, again, as a congressman from 1995 to 2001. I commenced preparing these materials while I was a professor of law at Stanford, and I completed the manuscript while dean of the Haas School of Business at the University of California at Berkeley. The examples are drawn from issues with which I personally dealt while in public office.

Over the years I taught courses in this subject area, my law students at Stanford Law School and my college students at Stanford in Washington, D.C., provided me many valuable insights. I was also privileged to have many excellent research assistants who helped with the preparation of these materials, most important, David Graubert and Jeff Negrette of the Stanford Law School and Cameron Doolittle of the Boalt Hall School of Law and Haas School of Business, University of California at Berkeley. My new colleague, Jesse Choper, provided many valuable comments on—and corrections to—the manuscript.

John Hart Ely gave me the chance to become a law professor at Stanford, and Paul Brest made it possible for me to serve in public office while maintaining my position on the faculty at Stanford. I owe them each a profound debt of gratitude.