Imagine for a moment that you work for a legislator in a state where marijuana remains illegal. One day, you arrive at the office and your boss tells you that she finally has the votes to pass a bill that would legalize the drug. Her colleagues have come around to the realization that marijuana is less harmful than alcohol and that adults should be able to visit retail stores and buy the drug for recreational or medical use. Your boss, who seems very excited, tells you to write up a draft bill with all the relevant details of what the system of legal marijuana in the state should look like, so that she can send it to her colleagues and get the legislative process started. She makes it clear that all the state’s relevant stakeholders—patients, doctors, public health professionals, minority activists, police officers, environmentalists, businesspeople, and everyone who just really digs weed (or hates it)—are eagerly awaiting the draft legislation. A lot, in other words, is riding on your work.

You agree to start drafting the bill and head to your office. After you finish your coffee and scroll through Twitter and watch a video of an owl playing Jenga, you open your word processor and get ready to start typing. The cursor is blinking at you. What do you write?

This is a rhetorical question, of course. You don’t have to answer.
But one thing you may find helpful as you get started on the bill is to understand a little better what the goals of the statute are supposed to be. You pick up the phone and buzz your boss, who picks right up. You ask her your question about the goals. She hesitates a bit and then says something like this:

Well, the idea is that adults should be able to buy a wide range of cannabis products for either medical use or just for fun and relaxation. Of course, marijuana poses some important public health risks, so we might want to be careful there, restrict advertising perhaps, maybe keep the price of the products artificially high through fees and taxes. But then again we don’t want the price so high that people keep buying from the illicit market. On the other hand, though, we want to make sure that the state as well as local governments can raise revenue for schools and infrastructure. We also want cities and towns to have some control over whether and how marijuana can be sold within their borders. But not so much control that it becomes impossible for people to access legal products. We want to create conditions for a thriving industry in the state with lots of growers and retail stores. We can’t allow too much marijuana to be grown, though, or we might end up with a glut that will drive prices down. On the other hand, we don’t want supply shortages because then people who really need it won’t be able to get their medicine. Oh, and by the way, since the war on drugs has disproportionately harmed communities of color over the past fifty years, we need to make sure that people from those communities play a central role in the industry going forward. And while we’re at it, don’t forget that marijuana is a really thirsty plant that takes lots of water and energy to grow, so make sure to include some stuff about protecting the environment. That should get you started, right?

You hang up and return to your screen. No problem, you think. How hard could it be to draft a bill that will protect the environment, promote social equity, provide wide access to a variety of products, safeguard public health, dry up the illicit market, raise lots of money in revenue, and provide local control over what gets sold within cities and towns, but not so much control that people can’t easily access legal products. Piece. Of. Cake.

You start writing. It takes about fifteen seconds for you to realize that no, this is not going to be a piece of cake. A thousand questions occur to you. What kinds of licenses should the state make available? How high
should the taxes be? Should the taxes be linked to sales of the product? The weight of marijuana sold? Amount of THC in the marijuana? Should the state set a cap on the amount of marijuana that cultivators can grow or on how many licenses it will issue or on how many licenses any one person can own? Public health is important, but what does that mean for the bill? What kinds of warnings should manufacturers have to put on their products? Should weed companies be able to advertise their products freely? Does the First Amendment even allow a state to restrict advertisements? What kind of DUI (driving under the influence) law should we have? How much control over marijuana policies should we give cities and towns? Should certain types of products like marijuana concentrates with extremely high THC levels be banned? Should employers be allowed to test their employees for marijuana use? Can employees be fired for using medical marijuana even if they’re not impaired at work? What kind of light bulbs should indoor growers use? Will home delivery be available? Can people grow plants at home? How many? We don’t want to allow too many plants because that could result in diversion to the illicit market. Should the police be able to search cars and homes based on the smell of weed even when it’s legal? What about social use establishments? We don’t want people to go to a club, smoke a lot of weed, and then drive home high. But if we don’t have them, then where will people who don’t own their own homes consume their weed? In public? Surely that has to be illegal. And what about this equity problem? How in the world will we ensure that people from disproportionately affected communities have an equal opportunity to get licenses? Do we grant priority for licenses to businesses from those communities? Provide loans or grants? Is that even constitutional under the Equal Protection Clause? Maybe the legislature shouldn’t be the body that makes all these decisions. Perhaps just give the power to come up with the details to some agency. But what agency? An existing agency? Maybe a new agency? What would that even look like?

After several hours of fruitless and frustrating work, you stop and look at the clock. Luckily, it’s lunch time. A perfect opportunity to start looking for a new, simpler job. Something, perhaps, in the field of brain surgery or rocket engineering?
Marijuana legalization in the United States, it would seem, is here to stay. Less than a dozen years ago, not a single state allowed its citizens to use marijuana for recreational use. Today, nineteen states and the District of Columbia, encompassing more than one-third of the nation’s population, have legalized marijuana for recreational purposes, and several other states are moving in that direction.\(^1\) Marijuana remains illegal at the federal level, of course, but while the drug’s illegality creates substantial obstacles for the multibillion-dollar domestic weed industry (federal tax law, for instance, prohibits marijuana businesses from deducting expenses other than their cost of goods sold, and the fear of federal prosecution has caused most banks to keep their distance from the industry), the Justice Department has shown little interest over the past decade in interfering in states where the drug is legal. Members of Congress are beginning to soften their stance toward cannabis, and many if not most experts believe that it won’t be long before the era of federal prohibition fades into history.

The inevitable full legalization of recreational marijuana in the United States is not, however, the end of the story. Indeed, in many ways, it is just the beginning. It has become almost commonplace these days to observe that how marijuana should be legalized is at least as important an issue as whether it should be legalized. And it also turns out to be a much more difficult question. Or, actually, set of questions. As my dramatization was meant to demonstrate, there are really hundreds if not thousands of questions big and small that need to be answered before a state or nation can hope to actually legalize the growth, sale, and purchase of marijuana, and even that dramatization radically simplifies the problem by assuming that private, for-profit companies, rather than nonprofits or even the government itself, should supply the market.

How states (and/or the feds, if they get involved) choose to answer these questions will dictate what kind of marijuana policy we are going to have in a post-legalization America. If states choose to focus on redressing past wrongs inflicted on minority communities by the drug wars of the past, for example, we could end up with a just and equitable marijuana policy in which Black and Latinx individuals play a leading role in the
industry. If states choose instead to ignore these past harms, the policy we end up with may very well replicate the many injustices already suffered by poor and minority communities over the past century. States that appropriately address questions about what types of licenses to provide, how much marijuana may be grown, and at what level to tax the drug will end up with an adequate but not surplus supply of cannabis being sold at suitable prices, while states that get these questions wrong may end up with gluts or shortages or a thriving illicit market.

Similarly, states that rightly recognize the limits of drug testing for THC and implement this understanding in their DUI and employment laws will protect innocent drivers and employees, while states that stand firm on outdated attitudes about marijuana testing will end up punishing people unfairly and deterring would-be users from enjoying the drug. States that severely restrict advertising and other marketing techniques, cap retail licenses at some relatively small number, and provide cities and towns with broad authority to prohibit marijuana businesses from operating may end up looking a lot like Uruguay—which, when it became the first country to completely legalize cannabis in 2013, did so in a very conservative manner—while states that allow marijuana advertisements, billboards, and sports sponsorships, that provide unlimited retail licenses, and that don’t give cities and towns the power to keep marijuana businesses out of their borders might look (and smell) like the parking lot outside a Grateful Dead concert in 1978.²

Thus far, most of the jurisdictions that have legalized the use of marijuana for recreational use have gone several steps further and created licensing systems to authorize and govern the cultivation and sale of the drug. The pioneering policymakers who have designed these regulatory systems basically from scratch—legislators and agency heads and experts of all types—deserve a standing ovation for taking on these extremely difficult and largely thankless tasks. Sure, one could criticize regulatory bodies like the Cannabis Control Commission (CCC) in Massachusetts or the Bureau of Cannabis Control in California for not getting everything done 100 percent perfectly and at record speed when deciding how to regulate an entirely new legal industry from the ground up, but that would be entirely unfair. The CCC, for example, developed over a hundred pages of dense regulations in its first year of existence, while facing enormous
pressure from constituencies on all sides of the marijuana issue. Having worked for the government, I found the job done by the CCC to be, quite frankly, amazing.

Unsurprisingly, the states that have developed comprehensive regulatory schemes for marijuana have taken different approaches to many of the questions I’ve been talking about. Some states have made racial equity a key focus of their programs, while others have not. Some have taken the environmental challenges posed by marijuana growth seriously, but not all have. With respect to supply issues, by failing to cap the number of licenses handed out or the amount of cannabis that can be grown, some states have allowed for the production of far too much marijuana, thus threatening the viability of many small businesses within their states and creating incentives for growers to divert supplies both to the illicit market and to other states. Jurisdictions have adopted all sorts of tax schemes for marijuana; the state of Washington, for instance, imposes a 37 percent sales tax on the drug, while in next-door Oregon the sales tax is only 17 percent. A few states and localities have authorized the creation of social use clubs, but very few clubs have actually opened, and most other jurisdictions haven’t even come close to giving social use clubs the green light. Some states have protected employees who use marijuana for medical use, but others have not, and only a handful of states have protected those who use the drug for recreational purposes. All states give cities and towns some control over whether and where marijuana businesses can set up shop, but they differ in the amount of local control allowed. In some states, the police are still allowed to conduct searches of cars and homes based on the smell of marijuana alone, but other states have put a stop to such practices.

As policymakers in the states that have already legalized marijuana for recreational purposes seek to adjust their programs, and for those citizens and leaders in states that inevitably will follow the trend toward legalization, it has now become extremely important to switch gears and think systematically not about whether to legalize marijuana but how specifically to do so. The future of the industry—and, to some degree, the nation—depends on it. Because these decisions will have such important effects on so many aspects of the lives of their citizens, jurisdictions considering legalization must first seriously consider what exactly they want
from legalization. Which values do they want to promote? What criteria do they want to maximize? How will they balance competing concerns? Do they value public health more than racial equity? Are low prices more important than conserving energy? Should local control outweigh concerns about availability, or vice versa? Will protecting the environment be a priority? Once states have thought about these big-picture issues, they will be much better positioned to make informed and thoughtful choices about the countless specific questions they will have to answer when modifying or designing their legalization regimes. And the same goes for those who would reform our federal stance toward weed: the earlier we start thinking about what federal legalization should look like, the better.

**WHAT IS THIS BOOK, ANYWAY?**

Back in 2015, I was working in my office at the Boston University School of Law when a representative from one of the major legal publishing houses (we’ll call her Kathy) came by to chat. A couple of times a year, reps like Kathy stop in to talk with professors about what materials we plan to use for our upcoming courses and to let us know if their company has published any new books in our fields that we might want to assign. We chatted about my First Amendment and Environmental Law courses, and then Kathy told me about a new casebook (the legal profession’s version of a textbook) that her company was planning to publish on marijuana law. The book, written by a terrific constitutional law scholar at Vanderbilt University named Robert Mikos, was in development, and Kathy wanted to know if I knew of anyone at Boston University who might be interested in teaching a course in cannabis law.5

_Hmmmmmm, _I thought to myself, _maybe me?_ I had been looking for a new seminar to teach, and although I didn’t really know anything about marijuana law, the brand-new field seemed groundbreaking and exciting. Also, I love weed. I knew the students would be interested, but I wasn’t so sure about the administration. I got a copy of the book in progress and decided I’d give the course a try. I ran the idea by the associate dean, who then talked to the dean about it, and although there were a few raised eyebrows here and there for sure, I got the green light to teach the course,
although the dean insisted that I call it “The Law and Regulation of Cannabis” instead of my preferred “Marijuana Law” because she thought the former sounded more serious and legitimate. I’ve been teaching the course ever since. The class is unsurprisingly popular, and it has turned out to be even more fascinating than I had expected. Partly, this is because weed itself is just completely interesting. But it’s also because, as we will see throughout this book, marijuana law touches nearly every area of law you can think of—from obvious candidates like criminal law and constitutional law to corporate, banking, and tax law, as well as just about everything else, from intellectual property to immigration to employment law and beyond.

As I started teaching and reading and writing about cannabis law over the past few years, I learned a great deal about the racist and irrational history of marijuana prohibition, thought a lot about what the various goals of marijuana policy ought to be, and considered how those goals relate to specific issues that arise every day in this new, highly uncharted territory. These concerns are at the heart of this book’s first part (chapters 1–3), the main goals of which are to identify the key potential criteria for evaluating different models of marijuana legalization and to explain how the ranking of these criteria will affect some of the more critical decisions that states must make regarding legalization. Chapter 1 lays out a brief history of how the law has treated marijuana in the United States over the past century, highlighting the overtly racist and unscientific nature of that history and the continuing harms of federal illegality. Chapter 2 then systematically analyzes the various criteria that one might employ to evaluate any given marijuana legalization regime, explores the ways that those criteria conflict, and suggests a prioritization of criteria that I believe should guide any sensible and equitable marijuana policy. In chapter 3, I apply this framework to a set of ten basic questions that all states must consider when first setting up their marijuana markets—everything from whether to impose caps on how many licenses any one person can control, to whether to allow people to grow their own weed, to what level of taxes to impose on cannabis sales. Although I will, of course, argue for my preferred policy choices, I will also leave room for those who do not share my value preferences to understand what practical consequences stem from their preferred criteria. Ultimately, my primary purpose in this part of the
book is to provide a conceptual framework that anyone can use to think about how marijuana should be legalized in the United States.

Still, I have some pretty strong preferences, and although I’ll say much more about them beginning in chapter 2, I’ll say a bit about them now. After all, everyone who writes about marijuana policy comes to the subject with their own biases, and readers deserve to know something about those biases in order to better evaluate whatever they’re reading. So, here’s my bias, in case you missed it earlier: I love weed. I love everything about it: its look, its smell, its taste, and, of course, its effects. Depending on what product or strain I’ve used and what my mood is and what I’m doing while I’m under its influence, marijuana might make me think in ways I find exciting and unexpected or make me feel like a dollop of warm chocolate melting over an ice cream sundae or make me laugh like a hyena over a ludicrous joke or give me a feeling of euphoria like I’m soaring over the earth on top of a giant cartoon bird. Weed also has the benefit of making everything else so much better than it is without weed. I’ve eaten at Michelin starred restaurants while high, squeaking with pleasure at every bite, listened to live music that, with the drug’s help, brought me to tears of joy, and watched idiotic sitcoms that marijuana transformed into comic masterpieces. No matter what the stresses of the day have been or what deadlines I’m up against or what people have said about me on social media, when I’ve finished doing whatever I have to do and I’ve unlocked my treasure chest of fragrant flower and tasty edibles, I know that at least the next few hours will be filled with bliss. In short, weed rules!

Okay, so weed rules, now what? Well, it certainly does not mean that I think everything goes. It’s not like I’m writing the book while high or anything (mostly). For one thing, I’m quite aware of my own privilege as a well-off white person and of the long history of racist marijuana policy and enforcement. With the knowledge that Black people have been almost four times more likely than whites to be arrested for a marijuana offense and that the ill-conceived “war on drugs” has devastated cities and neighborhoods and families of color for several decades, I believe that promoting equity in the marijuana industry is of paramount importance. Moreover, as someone who taught classes in environmental law for nearly twenty years and has a deep appreciation for the natural world, I support the imposition of fairly strict environmental and energy controls in the