cases about arbitrating arbitrability, the Court has opened the door for arbitrators to resolve any conflict about the arbitration.[15] As counterintuitive as it seems, the Court has held that "parties can agree to arbitrate 'gateway' questions[,] . . . such as whether the[y] have agreed to arbitrate" a particular claim.[16]

These Supreme Court opinions are widely seen as a brutal one-two punch to the plaintiffs' bar. According to conventional wisdom, *Concepcion* and its progeny have sounded "the death knell for consumer and employment class actions."[17] As scores of policymakers, scholars, and journalists have noted, few individuals spend the time and money necessary to arbitrate small grievances.[18] Likewise, the Court's

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[substantive] arbitrability' for a court to decide."). Unfortunately, the Court sometimes refers to issues of "substantive arbitrability" simply as issues "arbitrability," and matters of "procedural arbitrability" as *not* involving "arbitrability." *See, e.g.*, *id.* at 83–84.

15. The Court announced that parties could empower the arbitrator to decide whether a dispute falls within the scope of an arbitration clause in the collective bargaining context. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 n.7 (1960) (explaining that the party claiming arbitrability is "excluded from court determination" and "must bear the burden of a clear demonstration of that purpose"). Eventually, the Justices extended this principle to other settings. *See* Rent-a-Center, W., Inc. v. Jackson, 561 U.S. 63, 66 (2010) (enforcing a provision in a freestanding arbitration agreement between an employer and an employee that delegated to the arbitrator exclusive authority "to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement"); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 946 (1995) (observing that parties to a commercial contract can "clearly agree[] to have the arbitrators decide (i.e., to arbitrate) the question of arbitrability").

16. *Rent-A-Center*, 561 U.S. at 68–69.

17. Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103, 116 (2015); *see* Aaron Blumenthal, Comment, *Circumventing* Concepcion*: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699, 701 (2015) ("The death knell of the consumer class action has sounded."); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 627 (2012) ("All of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to the game-changing edict that companies . . . may simply opt out of potential liability by incorporating class action waiver language in their standard form contracts . . . ."); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015) ("A private entity, through contractual arbitration provisions, can now significantly reduce or even remove its substantive legal obligations by eliminating claiming."); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1222 (2013) ("[C]iting *Concepcion*, judges are compelling arbitration of claims that are destined to fail."); *see also* Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 118–33 (2011) (critiquing *Concepcion*).

18. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2814–15 (2015) (noting that "almost no consumers or employees 'do' arbitration at all"). In 2016, the Consumer Financial Protection Bureau ("CFPB") cited these concerns to ban class-arbitration waivers in financial-services contracts. *See* Arbitration Agreements, 82 Fed. Reg. 55,500 (Nov. 22, 2017) (to be codified at 12