COMMENT

SALVAGING THE LAW OF PATENT VENUE: BRUNETTE, TC HEARTLAND, AND THE VENUE CLARIFICATION ACT

CAMRON BAGHERI†

In TC Heartland v. Kraft Foods Group Brands, the Supreme Court reaffirmed the principle that no part of the general venue statute, 28 U.S.C. § 1391, could supplement the patent venue statute, 28 U.S.C. § 1400(b). Yet, in Brunette Machine Works v. Kockum Industries, the Court nevertheless held that former § 1391(d), which allowed suits against aliens in any district, applied in patent cases because aliens simply lacked all venue defenses. But then, in 2011, Congress passed the Venue Clarification Act, amending § 1391 to affirmatively give a venue defense to permanent resident aliens. This entangled trifecta of venue law sources leaves open several important questions about the current state of patent venue: Does Brunette contravene TC Heartland? Does the Venue Clarification Act overrule Brunette? Does TC Heartland forbid applying the Venue Clarification Act to patent suits? This Comment reconciles these sources of law and extricates them from their current mire. Ultimately, this Comment argues that Brunette and TC Heartland do not conflict, that Brunette must be tweaked to accommodate the Venue Clarification Act, and that select provisions of the Venue Clarification Act do, in fact, apply to the patent venue statute.

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† University of Pennsylvania Law School, J.D. Candidate, 2019; B.E., B.S., 2016, Youngstown State University. Sincere thanks to R. Polk Wagner, Professor of Law, University of Pennsylvania, for helpful advice and guidance in the drafting of this Comment.
INTRODUCTION

This Comment investigates some newfound problems plaguing the law of patent venue in the wake of the Supreme Court’s recent decision in TC Heartland v. Kraft Foods Group Brands. In TC Heartland, the Court constricted the set of districts in which domestic corporations may be sued for patent infringement and, in doing so, reaffirmed that patent venue is governed exclusively by 28 U.S.C. § 1400(b) and is not to be supplemented in any way by the general venue provisions of 28 U.S.C. § 1391. The Court, moreover, explicitly declined to address patent venue for foreign corporate defendants or foreign defendants generally. Many courts and commentators thus assumed that foreign defendants may still be sued in any judicial district because, as explained by the Court in Brunette Machine Works v. Kockum Industries, alien defendants are wholly outside the protection of the venue statutes. However, the Federal Courts Jurisdiction and Venue Clarification Act of 2011 affirmatively gave permanent resident aliens domiciled in the United States a venue defense, thereby challenging a central pillar of Brunette’s reasoning.

This Comment explores the tensions lurking between Brunette, TC Heartland, and the 2011 Venue Clarification Act and examines some potential resolutions available to the Court. First, Part I describes the history of the general and patent venue statutes, beginning with the first venue provision in the Judiciary Act of 1789. Part II then examines the facts, holdings, and reasonings of TC Heartland and Brunette in detail and explicitly identifies the primary problems and inconsistencies currently existing in the law of patent venue. Finally, Part III examines three potential solutions—affirming, overruling, or tweaking Brunette—that the Court could use to address these problems.

Ultimately, this Comment argues that the best solution would be for the Court to simply adjust the holding of Brunette, which currently states that all aliens lack venue protections, to state that all nonresidents lack venue protections. This would eliminate the possibility of venue gaps while simultaneously respecting Congress’s clear manifestation of intent to universally shift the focus of venue law from alienage to residence. Such a
move, however, would amount to using § 1391(c)(1) and (c)(3), which grant aliens venue defenses and shift the focus of venue to residence, to supplement § 1400(b). This seemingly contravenes TC Heartland, which held that § 1391(c)(2), which defines corporate residence in terms of personal jurisdiction, does not supplement § 1400(b).

An appropriate justification for such an analytical move is presented, however. Since it has been historically normal for § 1391 and § 1400(b) to have different definitions of corporate residence, Congress’s act of amending the definition of corporate residence in the general venue statute did not signal an intent to work the same change in the patent venue statute. On the other hand, because it has been historically normal for § 1391 and § 1400(b) to have the same definition of natural-person residence and to treat alien defendants in the same way, Congress’s act of amending § 1391(c)(1) and (c)(3) arguably signaled a much stronger intent to work the same change in § 1400(b).

I. VENUE HISTORY

A brief review of the history of the venue statutes will help in analyzing the current state of patent venue law.1 The first venue provision was established by the Judiciary Act of 1789. It provided that suits “against an inhabitant of the United States” could be brought only in judicial districts “whereof [the defendant] is an inhabitant, or in which he shall be found.”2 Because of this language, venue protection did not extend to foreign defendants—those who were not inhabitants of the United States.3 This section of the 1789 Act also provided a minimum amount-in-controversy requirement and applied only to cases in which the federal and state courts had concurrent jurisdiction.4

After nearly a century without change, Congress twice amended this provision. First, in 1875, Congress replaced the phrase “against an inhabitant of the United States” with “against any person.”5 Second, in 1887, Congress

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2 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.
3 See In re Hohorst, 150 U.S. 653, 660-61 (1893) (stating that the 1789 venue provision “applied only to inhabitants of the United States; for its words were that no civil suit should be brought against an inhabitant of the United States . . . in any other district than that whereof he is an inhabitant, or in which he shall be found”).
4 See § 11, 1 Stat. at 78 (stating that “the circuit courts [of the United States] shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars” (emphasis added)).
increased the minimum amount in controversy and removed the provision providing proper venue where a defendant may be found.6

Although the phrase “against any person” would seem to have broadened the applicability of the venue statute to all persons rather than just inhabitants of the United States, the Supreme Court in In re Hohorst declared the change to be stylistic only.7 To support this position, the Court stressed that any other interpretation would immunize foreign defendants from suit since aliens, by definition, do not inhabit any judicial district.8 Thus, the Court held that foreign defendants—both natural persons and corporations—still lacked venue protections and could therefore be sued anywhere.9

The Hohorst opinion, however, further supported its ruling by noting the inconsistency of applying the general venue statute to patent cases.10 Since the general venue statute had a minimum amount-in-controversy requirement and applied only to cases where state courts had concurrent jurisdiction, it could not reach patent suits, the Court implied, since patent cases required no minimum amount in controversy and were exclusively under federal jurisdiction.11 This caused great confusion among the lower courts as to whether the venue laws applied to patent suits at all.12

In response to this rampant confusion, Congress enacted the Patent Statute of 1897, which provided that patent suits could be brought “in the

7 See Hohorst, 150 U.S. at 661 (“The substitution . . . of the words ‘against any person’ for the words ‘against an inhabitant of the United States,’ has been assumed to be an immaterial change.”).
8 See id. at 660 (“To construe the [general venue] provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction . . . would be inconsistent with the general intent of the section . . . .”). Because the 1887 Act removed the provision providing proper venue where a defendant may be found, venue was proper only in the district where the defendant was an inhabitant. However, foreign defendants were considered inhabitants of no district. See Brunette Mach. Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 709 (1972) (“[T]he general venue provisions were framed with reference to the defendant’s place of residence or citizenship, and an alien defendant is by definition a citizen of no district.”).
9 See Hohorst, 150 U.S. at 662 (holding that the general venue statutes were “inapplicable to an alien or a foreign corporation . . . [and] consequently, such a person or corporation [could] be sued by a citizen of a State of the Union in any district”).
10 See id. at 661-62 (“If the [venue] clause . . . defining the district in which suit shall be brought is applicable to patent cases, the clause limiting the jurisdiction to matters of a certain amount . . . must be . . . equally applicable, with the result that no court . . . would have jurisdiction of patent suits involving a less amount . . . .”); see also Brunette, 406 U.S. at 712 (“The venue restrictions, said the [Hohorst] Court, were intended to apply only to that part of the federal jurisdiction that was concurrent with state court jurisdiction, and not to patent suits, which are entrusted exclusively to the federal courts.”).
11 Hohorst, 150 U.S. at 662.
12 Stonite Prods. Co. v. Melvin Lloyd Co., 315 U.S. 561, 564 (1942) (“After the holding of In re Hohorst . . . the lower federal courts became uncertain as to the applicability of the [general venue statute] to patent infringement proceedings.”); see also Brunette, 406 U.S. at 712 (“After Hohorst, there was great confusion on this point in the lower courts.”).
district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business.” In Stonite Products Co. v. Melvin Lloyd Co., the Court recognized that Congress enacted this law to eliminate lower court confusion by “defin[ing] the exact jurisdiction of the federal courts in actions to enforce patent rights.” So, the Court held that the patent venue statute was the exclusive venue provision for patent suits, “not intend[ed] . . . to dovetail with the general [venue] provisions.”

In 1948, Congress recodified the venue statutes. The new patent venue law, 28 U.S.C. § 1400(b), provided that venue was proper “where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” Thus, the focus shifted from inhabitance to residence. The new general venue law, 28 U.S.C. § 1391, stated that “[a]n alien [could] be sued in any district” and expanded the definition of corporate residence, previously only the state of incorporation, to “any judicial district in which it is incorporated or licensed to do business or is doing business.”

Despite these amendments, the Court in Fourco Glass Co. v. Transmirra Products Corp. held that venue in patent cases had not been substantively changed. First, the Court noted that, because “inhabitant” and “resident” are “synonymous words [that] mean domicile,” the codification of § 1400(b) did not substantively affect patent venue. Second, because § 1400(b) is the “sole and exclusive provision controlling venue in patent infringement actions, and . . . is not to be supplemented by the provisions of . . . § 1391(c),” the expanded definition of corporate residence in the general venue statute did not apply in patent cases. Thus, for patent purposes, corporations were deemed to reside only in their state of incorporation, notwithstanding § 1391(c).

By the 1970s, the Supreme Court had twice ruled, in Stonite and Fourco, that the patent venue statute alone controlled venue in patent cases. However,

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14 353 U.S. at 226.
15 Id. at 226-27; see also id. at 226 n.5 (“The [patent venue statute] is intended to remove this uncertainty and to define the exact jurisdiction of the circuit courts in [patent] matters.” (quoting 29 CONG. REC. 1900 (1897))).
17 § 1391(d), 62 Stat. at 935.
18 In re Hohorst, 150 U.S. 653, 662 (1893) (“[A] corporation cannot be considered a citizen, an inhabitant or a resident of a State in which it has not been incorporated . . . .”).
19 § 1391(c), 62 Stat. at 935.
20 See 353 U.S. 222, 228 (1957) (“[W]e hold that 28 U.S.C. § 1400(b) . . . made no substantive change [to the law of patent venue] as it stood and was dealt with in the Stonite case.”).
§ 1400(b) had no provision regarding venue for foreign defendants.23 To eliminate potential venue gaps, the Court in Brunette, while reaffirming that § 1400(b) stood alone, simultaneously invoked the underlying principle of § 1391(d), which allowed aliens to be sued in any district, to hold that foreign defendants were “wholly outside the operation of all the federal venue laws, general and special.”24 Thus, § 1400(b) was still the exclusive venue provision for patent cases; it just did not apply to foreign defendants because no venue law did.

In 1988, Congress again changed the definition of corporate residence under the general venue statutes, providing that “[f]or purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction.”25 Because § 1400(b) and § 1391 were in the same statutory chapter, the Court of Appeals for the Federal Circuit in VE Holding v. Johnson Gas Appliance Co. determined that Congress had signaled an intent to change the definition of corporate residence in patent cases as well.26 Thus, corporations were deemed to reside wherever they were subject to personal jurisdiction, whether or not the suit was for patent infringement.

In 2011, Congress most recently amended the general venue statutes via the Federal Courts Jurisdiction and Venue Clarification Act. This Act added a saving clause—“[e]xcept as otherwise provided by law”—to § 1391, gave a venue defense to lawfully admitted, permanent resident aliens residing in the United States, and provided that “a defendant not resident in the United States may be sued in any judicial district.”27 The Act also eliminated the language “under this chapter” that was heavily relied upon in VE Holding.

Finally, in TC Heartland, the Court overruled VE Holding, deciding that the 1988 and 2011 general venue amendments had not signaled a congressional intent to change the law of patent venue, and again reaffirmed that § 1400(b) is the sole and exclusive venue provision for patent suits, not to be supplemented in any way by § 1391.28 Thus, for patent purposes, domestic corporations again reside only in their state of incorporation, notwithstanding the contrary definition of corporate residence in the general

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23 See § 1400(b), 62 Stat. at 936.
26 See 917 F.2d 1574, 1580 (Fed. Cir. 1990) (“[T]he language of the statute is clear and its meaning is unambiguous . . . . Section 1391(c) applies to all of chapter 87 of title 28, and thus to § 1400(b), as expressed by the words ‘For purposes of venue under this chapter.’ There can be no mistake about that.”).
venue statute. The Court, however, made sure to note that it had not expressed any opinion regarding proper venue for foreign corporations.

II. A CLOSER LOOK AT TC HEARTLAND AND BRUNETTE

Now that the history of the venue statutes has been reviewed, this Part examines more thoroughly the details of the TC Heartland and Brunette opinions and explores potential problems and inconsistencies in the law of patent venue that may become the subject of future litigation.

A. TC Heartland: § 1400(b) Still Stands Alone

The facts in TC Heartland are straightforward. Kraft, the plaintiff, competed with TC Heartland in the flavored drink-mix market. Due to suspected patent infringement, Kraft, a limited liability company organized under the laws of Delaware, sued TC Heartland, a limited liability company organized under the laws of Indiana. TC Heartland, arguing that it neither resided nor had a regular and established place of business in the District of Delaware, moved to transfer the case to the Southern District of Indiana. Interestingly, Kraft alleged, and TC Heartland admitted, that TC Heartland was a corporation rather than a limited liability company. In fact, TC Heartland explicitly cited Fourco to support its argument that it did not reside in Delaware because it was not incorporated there. Thus, a case that should have concerned the definition of residence for limited liability companies instead focused on corporate residence.

Relying on VE Holding, which held that the expanded definition of corporate residence in § 1391 applied to § 1400(b), both the district court and the Federal Circuit sided with Kraft in denying the motion to transfer.

As mentioned above, the Supreme Court ultimately found that "the [1988 and 2011] amendments to § 1391 did not modify the meaning of § 1400(b) as interpreted by Fourco." Thus, the Court overruled VE Holding and reaffirmed Fourco by concluding that "a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute." In doing so, the
Court again held that § 1400(b) stands alone and is not to be supplemented by any other venue statute.

Now, an in-depth examination of the Court’s reasoning is paramount. To support its decision, the Court first noted that the argument put forth by Kraft—that “§ 1400(b) incorporates the broader definition of corporate ‘residence’ contained in the general venue statute”—was identical to the argument considered and rejected in *Fourco*. So, the Court framed the question as whether the law of patent venue had been substantively changed since the decision in *Fourco*.

Next, the Court recounted the historical evolution of the general and patent venue provisions, just as explained above in Part I. Here, the Court highlighted that, as decided in *Fourco* and *Stonite*, Congress’s enactment of the patent venue statute had “placed patent infringement cases in a class by themselves, outside the scope of the general venue legislation”; that Congress did not intend patent venue “to dovetail with the general provisions relating to the venue of civil suits”; and that “the patent venue statute ‘alone should control venue in patent infringement proceedings.'” Furthermore, the Court specifically emphasized that, while the general venue statute had been amended twice since *Fourco*, the patent venue statute had not been directly amended at all. Thus, any change in the meaning of the patent venue statute could be implied, if at all, only from direct changes in the general venue statute.

Now on the search for an implicit amendment, the Court proclaimed that, “[w]hen Congress intends to [indirectly amend one statute by directly amending another], it ordinarily provides a relatively clear indication of its intent in the text of the amended provision.” Thus, the Court would apparently not hold that the meaning of § 1400(b) was supplemented by § 1391 unless the very text of § 1391 clearly indicated so. Unfortunately for Kraft, and for patent plaintiffs generally, the Court ultimately concluded that the text of § 1391 manifested no such intent.

The Court proffered three textualist arguments for this finding of no congressional intent. First, it noted that, “[a]lthough the current version of § 1391(c) provides a default rule that applies ‘for all venue purposes,’ the version at issue in *Fourco* similarly provided a default rule that applied ‘for

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39 Id. at 1516-17.
40 See id. at 1518-20 (noting that “[t]he history of the relevant statutes provides important context for the issue in this case”).
41 Id. at 1518.
42 See id. at 1517 (“Congress has not amended § 1400(b) since this Court construed it in *Fourco* . . . .”); id. at 1520 (“Congress adopted the current version of § 1391 in 2011 (again leaving § 1400(b) unaltered);” (emphasis added)).
43 Id. at 1520.
44 See id. (“The current version of § 1391 does not contain any indication that Congress intended to alter the meaning of § 1400(b) as interpreted in *Fourco*.”).
venue purposes.”45 Because both phrases—“for all venue purposes” and “for venue purposes”—had previously been construed to comprehensively mean “all venue statutes,”46 the Court did “not see any material difference between the two phrasings,” thereby strengthening the analogy to Fourco.47

Second, the Court strongly emphasized the presence of the phrase “except as otherwise provided by law” in §1391(a), which it termed a “saving clause.”48 The Court explained that the holding of Fourco and the argument of TC Heartland were even stronger under the current version of §1391 since the statute itself now includes “a saving clause expressly stating that it does not apply when ‘otherwise provided by law.’”49 That is, “Fourco’s holding rests on even firmer footing now that §1391’s saving clause expressly contemplates that certain venue statutes may retain definitions of ‘resides’ that conflict with its default definition.”50

Lastly, the Court explained that, if Congress manifested any intent in the 2011 Venue Clarification Act, it was to legislatively overrule VE Holding.51 Specifically, the Court noted that, “[i]f anything, the 2011 amendments undermine [VE Holding’s] rationale” because “Congress deleted ‘under this chapter’ in 2011 and worded the current version of §1391(c) almost identically to the original version of the statute.”52

Importantly, the Court declined to consider the implications of its decision on venue for foreign corporations and expressly chose to not reconsider its holding in Brunette.53

The TC Heartland opinion has received some pointed criticism from at least one scholar.54 Professor Bone, law professor at the University of Texas at Austin, argues that the Court completely ignored the real-world consequences of the decision (for example, drastically diminishing case concentration in the Eastern District of Texas) and describes the opinion as “surprisingly formalistic,” “remarkably thin,” and “unpersuasive . . . on its own terms.”55 Professor Bone further asserts that “[i]f the venue statutes were

45 Id.
46 See id. (citing Pure Oil Co. v. Suarez, 384 U.S. 202, 204-05 (1966)).
47 Id.; see also id. at 1521 (“[T]he addition of the word ‘all’ to the already comprehensive provision does not suggest that Congress intended for [the Court] to reconsider [Fourco].”).
48 Id. at 1521.
49 Id.
50 Id.
51 See id. (“[T]here is no indication that Congress in 2011 ratified the Federal Circuit’s decision in VE Holding.”).
52 Id.
53 See id. at 1520 n.2 (“The parties dispute the implications of petitioner’s argument for foreign corporations. We do not here address that question, nor do we express any opinion on this Court’s holding in Brunette . . . (determining proper venue for foreign corporation under then existing statutory regime).”) (citation omitted)).
54 See generally Bone, supra note 1.
55 Id. at 148.
the same today as in 1948, the TC Heartland Court would be justified in following Fourco . . . . But they are not [the same].”

Professor Bone supports his criticisms with three arguments. First, he argues that the Court’s search for a congressional intent to implicitly amend § 1400(b) misses the mark because making a term in a statutory provision subject to a definition appearing elsewhere in the same statute is not equivalent to amending the provision itself.

Second, Professor Bone notes that “Congress converted § 1391(c) from a substantive venue provision [containing] a definition into a purely definitional section,” thereby “further support[ing] the conclusion that Congress meant the § 1391(c) definition to apply [throughout all the venue statutes].”

Third, Professor Bone argues that the Court’s emphasis on Congress not manifesting an intent to ratify VE Holding or to overrule Fourco also misses the mark. He explains that, since “VE Holding had been the law for more than two decades,” “Congress might reasonably have assumed that VE Holding defined the legal baseline,” meaning that “there would have been no reason for Congress to say anything at all about Fourco Glass in 2011 or [to] signal any intent to change the meaning of § 1400(b).” Professor Bone extends this criticism to the Court’s reliance on the saving clause. He asserts that the Court’s argument “works only if Congress in 2011 assumed that Fourco Glass still defined corporate residence for purposes of § 1400(b). But it is at least equally plausible that Congress assumed VE Holding, not Fourco Glass, [controlled] . . . .”

An additional criticism that can be leveled against TC Heartland is that it seems to ignore Congress’s intent as manifested in the House Report accompanying the 2011 Venue Clarification Act. As explained above, TC Heartland reaffirmed Fourco and Stonite in holding that § 1400(b) stands alone and is not to be supplemented by § 1391. Admittedly, Congress recognized that § 1391 overall would not nullify the more than two hundred special venue provisions that exist throughout the United States Code. However, Congress

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56 Id. at 149.
57 See id. at 151 (“[T]he question [at issue] is not whether an amendment to one provision—§ 1391(c)—implicitly amends a different provision—§ 1400(b). [Rather, t]he question is whether a particular term (‘resides’) is subject to a definition appearing elsewhere in the same statute.”).
58 Id. at 151 n.67.
59 See id. at 152.
60 Id.
61 Id. at 153.
62 See TC Heartland LLC v. Kraft Foods Group Brands LLC, 137 S. Ct. 1514, 1518-20 (2017) (“[In Fourco, t]his Court squarely rejected that interpretation, reaffirming Stonite’s holding that § 1400(b) ‘is the sole and exclusive provision controlling venue in patent infringement actions, and . . . is not to be supplemented by . . . § 1391(c).’”).
63 See H.R. REP. NO. 112-10, at 18 (2011) (“New paragraph 1391(a)(1) would follow current law in providing the general requirement for venue choices, but would not displace the special venue rules that govern under particular Federal statutes.”); id. at 18 n.8 (“These specialized [venue]
also explicitly noted that § 1391(c), which provides the definition of corporate residence, would nevertheless apply universally. Thus, it seems that the Court utterly ignored this clear indication that § 1400(b), along with all other venue provisions in the United States Code, was intended to be substantively affected by the 2011 Venue Clarification Act. Regardless, TC Heartland (at least for the purposes of this Comment) is good law for the time being.

B. Brunette: Suits Against Aliens Are Beyond All Venue Protections

Now, we turn to the details of Brunette. Kockum Industries, an Alabama corporation, patented a bark-removing machine. Suspecting that Brunette Machine Works, a Canadian corporation, was helping others to make and use the invention, Kockum sued for indirect patent infringement in the District of Oregon. Brunette, relying on Fourco and Stonite, argued that § 1400(b) was the only venue provision applicable to patent suits. Since it was not incorporated in Oregon and lacked a regular and established place of business there, Brunette asserted that venue was improper. Although the district court accepted this argument and dismissed the case, the circuit court reversed, holding that § 1391(d), which at the time allowed suits against aliens in any judicial district, applied to all suits, including those for patent infringement.

Ultimately, the Supreme Court affirmed the circuit court and held that “suits against aliens are wholly outside the operation of all the federal venue laws, general and special.”

Again, analyzing the Court’s reasoning is paramount. Just as in TC Heartland, the Court began by reviewing the history of the venue statutes. It first considered the Judiciary Act of 1789 and noted that, “[b]ecause [the 1789 Act’s] limitation on the place where federal cases might be tried applied in terms only to suits against ‘an inhabitant of the United States,’ suits against aliens were left unrestricted, and could be tried in any district.” The Court

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64 See id. at 20 (“[T]he proposed subsection 1391(c) would apply to all venue statutes [sic], including venue provisions that appear elsewhere in the United States Code. It defines residence for natural persons, incorporated and unincorporated entities, and also provides a rule for nonresident defendants. This would replace current subsection 1391(c), which applies . . . only for purposes of venue under Chapter 87.” (emphasis added)).

66 Id.
67 Id.
68 Id.
69 Id.
70 Id. at 714.
71 Id. at 708-11.
72 Id. at 708.
then reaffirmed *Hohorst* by recognizing that the 1875 Act’s replacement of the phrase “against an inhabitant of the United States” with “against any person” was “stylistic and not substantive, and that Congress did not thereby bring suits against aliens within the scope of the venue laws.”

Next, the Court reiterated *Hohorst*’s rationale regarding immunizing foreign defendants from suit. Specifically, the Court noted that

> to hold the venue statutes applicable to suits against aliens would be in effect to oust the federal courts of jurisdiction in most cases, because the general venue provisions were framed with reference to the defendant’s place of residence or citizenship, and an alien defendant is by definition a citizen of no district.

The Court further buttressed this rationale by discussing the general desirability of construing statutes to avoid venue gaps.

Additionally, the Court strongly emphasized that the reasoning of *Hohorst* still applied since Congress had never signaled otherwise. Specifically, the Court noted that “Congress ha[d] never given the slightest indication that it [was] dissatisfied with the longstanding judicial view that the 1789 language continue[d] to color the venue statutes, with the result that suits against aliens [were] outside the scope of all the venue laws.”

The Court then turned its discussion to Congress’s enactment of the patent venue statute. It noted that, “after *Hohorst*, there was great confusion . . . in the lower courts” and that “Congress responded promptly [by] creating a special new venue statute for the occasion.” The Court recognized that, as held in *Stonite* and *Fourco*, this special statute “placed patent infringement cases in a class by themselves, outside the scope of general venue legislation.” In other words, the Court paid homage to the principle that § 1400(b) was the sole and exclusive venue provision governing patent suits and was not to be supplemented in any way by the general provisions of § 1391.

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73 Id. at 709.
74 Id.
75 Id.; see also id. at 710 (“[I]t should not lightly be assumed that Congress intended that result, in light of the fact that the venue provisions are designed, not to keep suits out of the federal courts, but merely to allocate suits to the most appropriate or convenient federal forum.”).
76 See id. at 710 n.8 (“Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.”).
77 Id. at 710.
78 Id. at 710-11.
79 Id. at 712-13.
80 Id. at 712.
81 Id. at 713.
Nevertheless, the Court stated that the fact that § 1400(b) stands alone “sheds no light on the present case”\(^82\) and ultimately held that aliens can be sued in any judicial district, as provided by then-existing § 1391(d).\(^83\) The Court justified this holding, which was seemingly inconsistent with Stonite, Fourco, and the first half of the Brunette opinion itself, by explaining that “it totally misconceives the origin and purpose of § 1391(d) to characterize that statute as an appendage to the general venue statutes” that “§ 1400(b) was intended to replace.”\(^84\) Rather, it “reflects . . . the longstanding rule that suits against alien defendants are outside those [venue] statutes.”\(^85\) Thus, “since the general venue statutes did not reach suits against alien defendants, there is no reason to suppose the new substitute in patent cases was intended to do so.”\(^86\)

The Court concluded its opinion by proclaiming that “[t]he principle [expressed in] § 1391(d) cannot be confined in its application to cases that would otherwise fall under the general venue statutes [because] § 1391(d) is properly regarded, not as a venue restriction at all.”\(^87\) Instead, it is “a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.”\(^88\)

Currently, many courts and commentators believe that, because it was not expressly overruled by TC Heartland, Brunette remains good law, meaning that foreign corporations, and foreign defendants in general, can be sued in any judicial district, even in patent suits.\(^89\) Others, however, argue that TC Heartland

\(^{82}\) Id.

\(^{83}\) Id. at 714.

\(^{84}\) Id. at 713.

\(^{85}\) Id.

\(^{86}\) Id.

\(^{87}\) Id. at 714.

\(^{88}\) Id.

\(^{89}\) See Koninklijke KPN N.V. v. Kyocera Corp., No. 17-0087, 2017 U.S. Dist. LEXIS 207204, at *7 n.5 (D. Del. Dec. 18, 2017) (“While TC Heartland declared that venue for a domestic corporation is governed solely and exclusively by § 1400(b), the Supreme Court made clear that this holding did not address the applicability of § 1400(b) to foreign defendants, explicitly stating that it was not ‘express[ing] any opinion on its holding in Brunette. Hence, Brunette remains good law.” (emphasis added) (citations omitted)); see also 3G Licensing, S.A. v. HTC Corp., No. 17-0083, 2017 U.S. Dist. LEXIS 207202, at *4 (D. Del. Dec. 18, 2017) (“Brunette remains good law . . . .”); Michael C. Smith, 2017 Year in Review: Patent Litigation, 81 TEX. B.J. 39, 40 (2018) (“The [C]ourt did not express any opinion on the implications of the decision on foreign corporations, thus for the moment, leaving the law with respect to venue against foreign corporations . . . untouched.”); Fish & Richardson, Unanswered Questions After TC Heartland, JD SUPRA (Dec. 19, 2017), https://www.jdsupra.com/legalnews/unanswered-questions-after-tc-heartland-88546 [https://perma.cc/AR5H-AP8R] (“Foreign corporations that do not reside in the United States likely remain subject to suit under § 1391(c)(3) in any judicial district, as they always have been.”); S. Gregory Herrman, Observations in the Wake of Narrowing of Patent Venue in ‘TC Heartland’, DEL. BUS. COURT INSIDER (June 7, 2017), https://www.blankrome.com/publications/observations-wake-narrowing-patent-venue-tc-heartland [https://perma.cc/AM6Z-G6WV] (“It seems unlikely, however, that the TC Heartland decision will have any significant impact on venue for foreign defendants.”); Diane Letteleir, The Real Impact of TC Heartland on the
purposely refrained from reaffirming Brunette, which may indicate that the Court’s rationale might have unforeseen consequences for foreign defendants.90

C. The Problem: Brunette Butts Heads with TC Heartland and Seemingly Contradicts the Venue Clarification Act

With the details of both Brunette and TC Heartland in mind, as well as the history of the venue statutes, two potential problems become apparent. First, TC Heartland and Brunette seem to contradict each other regarding whether § 1400(b) truly is the sole and exclusive provision governing venue in patent suits. Second, Brunette’s rationale, in light of the 2011 Venue Clarification Act, is now in question.

1. Under Brunette and TC Heartland, Does § 1400(b) Really Stand Alone?

At this point in time, the Supreme Court has thrice ruled in unambiguous terms that the special patent venue statute, § 1400(b), is the sole and exclusive provision governing venue in patent suits and that it is not to be supplemented in any way by the general venue provision, § 1391.91 TC Heartland reinforced this wall of separation between § 1391 and § 1400(b) by holding that the definition of corporate residence found in the former—and which, by its own terms, applies “for all venue purposes”—does not define corporate residence for the purposes of the latter.92 However, Brunette seemingly contradicts this clear rule because, in that case, the Court appeared to apply a


91 See supra Part I.

portion of the general venue statute—§ 1391(d) at the time—to the patent venue statute.\textsuperscript{93} In fact, \textit{Brunette} has been explicitly understood by many, including the Federal Circuit in \textit{VE Holding}, as directly supplementing § 1400(b) with § 1391.\textsuperscript{94} Thus, from one side of its mouth, the Supreme Court proclaims that patent suits are in a class by themselves, governed solely and exclusively by § 1400(b) with absolutely no consideration for the provisions of § 1391; but, from the other side, it appears to state that one provision of § 1391 nevertheless applies to patent suits anyway. This is the inconsistency that worries patent practitioners.\textsuperscript{95}

However, even though \textit{TC Heartland} and \textit{Brunette} seem contradictory on their faces, the inconsistency disappears upon closer review. When the wording and rationale of \textit{Brunette} are more carefully scrutinized, it becomes clear that the Court did not actually supplement § 1400(b) with § 1391(d). Rather, the Court explained that § 1391(d) is simply “a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and

\textsuperscript{93} See \textit{Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.}, 406 U.S. 706, 714 (1972) (holding that foreign defendants in patent suits can be sued in any judicial district, as provided by then-existing § 1391(d)).

\textsuperscript{94} See VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1579 (Fed. Cir. 1990) (“The Court [in \textit{Brunette}] held § 1391(d) applied, and that § 1400(b) was supplemented by the provision governing suits against aliens.”); \textit{see also Brief for Respondent at 12-13, TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514 (2017) (No. 16-341)} (“In \textit{Brunette}, this Court held that former Section 1391(d), which prevented alien defendants from raising venue objections, applied to patent-infringement actions governed by Section 1400(b).”).

\textsuperscript{95} See Matthew Bultman, Foreign Cos. Expected to Test Venue Rules After TC Heartland, LAW360 (June 5, 2017, 8:50 PM EDT), https://www.law360.com/articles/931373/foreign-cos-expected-to-test-venue-rules-after-tc-heartland [https://perma.cc/6BCY-PLJ4] (“With TC Heartland and other decisions, the Supreme Court has in effect said the special patent venue statute—Section 1400(b)—is the ‘be all and end all’ for patent venue . . . . Some might then question why courts are looking to another section when it comes to foreign defendants.” (emphasis added)); Rachel K. Hunnicutt & Alexander B. Owczarczak, Patent Venue After TC Heartland, WILEY REIN LLP (May 23, 2017), https://www.wileyrein.com/newsroom-articles-Implications_of_TC_Heartland.html [https://perma.cc/ZS65-83WY] (“The repeated, clear statements that § 1400(b) alone dictates patent venue determinations appears [sic] to be in tension with Brunette . . . .” (emphasis added)); \textit{see also Brief of Amici Curiae Eighteen Individuals & Organizations Representing Inventors & Patent Owners in Support of Respondent at 10 n.2, TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514 (2017) (No. 16-341)} (“Petitioner argues that [the definition of corporate residence under] Section 1391(c) cannot supplement or define any aspect of venue for Section 1400, but then concedes the opposite—that Section 1391(c) must supplement Section 1400 for foreign defendants.”); Brief of Amicus Curiae American Intellectual Property Law Ass’n in Support of Neither Party at 9, TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514 (2017) (No. 16-341) (“Although Petitioner argues that section 1400(b) is now the sole and exclusive provision governing venue in patent infringement actions, it does not explain why subsection 1391(c)(2), the general corporate venue statute, does not apply to section 1400(b), but section 1391(c)(3), the general non-U.S. resident venue statute, does.”); Joseph Re & Perry Oldham, \textit{TC Heartland Complicates Venue for Foreign Defendants}, LAW360 (June 29, 2017, 12:34 PM EDT), https://www.law360.com/articles/935949/TC-Heartland-complicates-venue-for-foreign-defendants [https://perma.cc/A7F9-JH46] (“The Supreme Court’s \textit{TC Heartland} ruling that the more restrictive patent venue statute (§ 1400(b)) should stand on its own is in tension with the long-standing rule in the general venue statute (§ 1391) that venue over foreign defendants can be in any judicial district.”).
In other words, before the codification of § 1391, the rule that alien defendants could not raise venue defenses was not written in a statute but was understood by the courts and Congress nonetheless. This implicit rule was the backdrop against which Congress enacted the special patent venue statute; since all venue laws at that time had excluded aliens, argued the Court, certainly Congress intended the newly enacted patent venue statute to likewise exclude aliens.

The Court further explained that “[t]he principle of § 1391(d) cannot be confined in its application to cases that would otherwise fall under the general venue statutes.” That is, § 1391(d) simply memorialized a far-reaching principle—that aliens have no venue defenses—and that principle's wide-ranging application could not be retroactively cabined just because the principle had been recognized in a more limited statute.

Thus, the Court in Brunette did not supplement § 1400(b) with § 1391(d). Instead, the Court recognized that § 1400(b) was enacted with an implicit exception—that it would not encompass foreign defendants—and this implicit exception would have applied even if the exception had not been written down in § 1391.

2. Does Brunette’s Rationale Still Apply?

Although Brunette’s holding can actually be squared with TC Heartland, Brunette’s reasoning may no longer be accurate. Recall that Brunette proffered two main reasons for holding that aliens could not raise venue defenses, even in patent suits. First, the Court was wary of immunizing foreign defendants from suit, as was the Hohorst Court. Thus, the Court preferred to construe

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96 Brunette, 406 U.S. at 714 (emphasis added).
97 See In re Hohorst, 150 U.S. 653, 662 (1893) (holding that foreign defendants "may be sued by a citizen of a State of the Union in any district").
98 See Brunette, 406 U.S. at 713 ("Since the general venue statutes did not reach suits against alien defendants, there is no reason to suppose the new substitute in patent cases was intended to do so.").
99 Id. at 714.
100 See In re Princeton Dig. Image Corp., 496 F. App’x. 73, 75 (Fed. Cir. 2012) ("By confirming that the general patent venue limitations of section 1400(b) were inapplicable in suits against foreign defendants, Brunette did not hold . . . that the Court was departing from its prior decisions . . . . Instead, Brunette merely reaffirmed the principle that foreign defendants should not be able to avoid suit in the United States based on a lack of residence or citizenship in this country.").
101 See Brunette, 406 U.S. at 709 ("[T]o hold the venue statutes applicable to suits against aliens would be in effect to oust the federal courts of jurisdiction in most cases, because the general venue provisions were framed with reference to the defendant’s place of residence or citizenship, and an alien defendant is by definition a citizen of no district."); In re Hohorst, 150 U.S. at 660 ("To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens.").
the venue statutes to avoid such immunization.\textsuperscript{102} Second, the Court emphasized that, in all the time since \textit{Hohorst}, “Congress ha[d] never given the slightest indication that it [was] dissatisfied with the longstanding judicial view that the 1789 language continues to color the venue statutes, with the result that suits against aliens are outside the scope of all the venue laws.”\textsuperscript{103} But as explained below, the 2011 Venue Clarification Act manifested much more than “the slightest indication” that Congress intended at least some aliens to have a venue defense, thereby significantly undermining this justification in \textit{Brunette}.

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 significantly amended, among other things, the general venue provisions of § 1391. First, it added the disclaimer “[e]xcept as otherwise provided by law” to § 1391(a).\textsuperscript{104} As explained in the accompanying House Report, this saving clause indicated that the new § 1391 “would follow current law in providing the general requirements for venue choices, but would not displace the special venue rules that govern under particular Federal statutes.”\textsuperscript{105}

Second, the Act changed the phrase “[f]or purposes of venue under this chapter” to “[f]or all venue purposes.”\textsuperscript{106} According to the House Report, this phrase signified that “subsection 1391(c) would apply to all venue statutes [sic], including venue provisions that appear elsewhere in the United States Code,” notwithstanding the disclaimer in § 1391(a).\textsuperscript{107}

Third, the Act provided that “a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled.”\textsuperscript{108} The Act also amended the prior version of § 1391(d), which provided that “an alien may be sued in any district,” to now read “a defendant not resident in the United States may be sued in any judicial district.”\textsuperscript{109} According to the House Report, the “proposed paragraph of 1391(c)(3) would change venue law by shifting the focus from ‘alienage’ of a defendant to whether the defendant has

\textsuperscript{102} See \textit{Brunette}, 406 U.S. at 710 n.8 (“Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.”).

\textsuperscript{103} Id. at 710-11 (emphasis added).


\textsuperscript{105} H.R. REP. NO. 112-10, at 18 (2011); see also id. at 18 n.8 ("These specialized statutes would continue to govern within their respective fields, and the general venue statute would govern . . . outside these special areas.").

\textsuperscript{106} Federal Courts Jurisdiction and Venue Clarification Act sec. 202, § 1391(c), 125 Stat. at 763.

\textsuperscript{107} H.R. REP. NO. 112-10, at 20; see also id. ("[Section 1391(c)] defines residency for natural persons, incorporated and unincorporated entities, and also provides a rule for nonresident defendants. This would replace current subsection 1391(c), which applies . . . only for purposes of venue under Chapter 87.").


\textsuperscript{109} Id. § 1391(c)(3), 125 Stat. at 763.
his or her ‘residence’ outside the United States.”

The report further explained that “[t]he proposed statute would grant a venue defense to permanent resident aliens who are domiciled in the United States.”

So, Brunette heavily relied on the fact that Congress had not made “the slightest indication” that aliens were to have venue defenses. Yet, in light of the 2011 Venue Clarification Act and accompanying House Report, Congress explicitly recognized that it was changing venue law by affirmatively giving a venue defense to at least a subset of aliens. The tension here is self-evident.

Accomplished practitioners Joseph Re and Perry Oldham explained the problem well:

Brunette’s rationale no longer seems to apply. No longer can one say that the venue statute merely recognizes the long-established rule that suits against foreign defendants are wholly outside the operation of all the federal venue laws, general and special. No longer is it accurate that all foreign defendants do not have a venue defense. When it amended § 1391, Congress created a venue defense for at least some foreign defendants. As a result, litigants will surely argue that Brunette is no longer good law.

III. POSSIBLE RESOLUTIONS

Now that the details of the relevant cases and statutes have been explored and the primary problem with Brunette has been uncovered, this Part examines some potential resolutions available to the Court. As explained below, these include reaffirming, overruling, or adjusting Brunette. Although legislative solutions are possible, they are beyond the scope of this Comment.

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111 Id. at 23; see also Mark W. McNerney & Thaddeus E. Morgan, The Federal Courts Jurisdiction and Venue Clarification Act of 2011, MICH. B.J., May 2012, at 20, 22 (“Previously, permanent resident aliens domiciled in the U.S. were treated the same as nonresident aliens for purposes of being barred from raising a venue defense.”).
112 See Brief for Respondent, supra note 94, at 24-25 (“T]he Venue Clarification Act substantially revised Section 1391(d). . . . [I]ts focus is now on residence rather than on citizenship: it now provides a venue defense for lawful permanent residents and foreign corporations doing business in the United States . . . .”); Re & Oldham, supra note 95 (“An examination of the Venue Clarification Act amendments, and the legislative intent behind them, casts doubt on Brunette’s reasoning that foreign defendants are outside of the venue rules.” (emphasis added)); see also Bultman, supra note 95 (“Another potential battleground could be whether the Supreme Court’s ruling in Brunette remains good law.”); Shearman & Sterling LLP, More Trouble Brewing in the Heartland: Foreign Corporation Immunity and Other Issues Arising from the Supreme Court’s Venue Decision, MONDAQ, http://www.mondaq.com/unitedstates/x/606728/Patent/More+Trouble+Brewing+in+the+Heartland+Foreign+Corporation+Immunity+and+Other+Issues+Arising+from+the+Supreme+Courts+Venue+Decision [https://perma.cc/Y3TY-GDHA] (last updated June 29, 2017) (“The logic of the earlier Brunette case is now in some doubt.”).
113 Re & Oldham, supra note 95.
A. Brunette Untouched

One way for the Court to theoretically resolve this issue is to simply leave Brunette untouched—in other words, to reaffirm it. As explained above, TC Heartland noted that “Congress has not amended § 1400(b) since th[e] Court construed it in Fourco, but it has amended § 1391 twice,” and the Court ultimately concluded that “the amendments to § 1391 did not modify the meaning of § 1400(b) as interpreted by Fourco.”114 If taken literally, the Court’s disposition indicates that neither the 1988 amendments nor the 2011 amendments to the general venue provisions had any effect on the patent venue statute at all. From this perspective, the fact that Congress affirmatively gave a subset of alien defendants a venue defense outside of patent law is irrelevant. Since Congress will have been deemed to have not manifested an intent to bring foreign defendants within the scope of the patent venue statute, Brunette arguably remains intact.

Indeed, the petitioner in TC Heartland briefly made this argument, stating that although “some alien defendants may have a venue defense under current § 1391(c) that did not exist at the time Brunette was decided, . . . neither before nor after 2011 does any subsection of § 1391 supplement § 1400(b).”115 The petitioners concluded their argument by explaining that, “as th[e] Court held in Brunette, alien defendants are simply outside the scope of § 1400(b).”116

Unfortunately, there are two problems with leaving Brunette untouched. First, Brunette was never limited to merely holding that “alien defendants are simply outside the scope of § 1400(b),” as the petitioners argued.117 Indeed, this significantly understates the opinion’s language. Rather, Brunette held that “suits against aliens are wholly outside the operation of all the federal venue laws, general and special.”118 Since the current version of the general federal venue law, § 1391, affirmatively gives at least some aliens a venue defense, it directly contradicts the literal holding of Brunette.119 Moreover, the Court, in its own words, reaffirmed “the longstanding rule that suits against alien defendants are outside [all venue] statutes”120 primarily because “Congress ha[d] never given the slightest indication that it [was] dissatisfied with th[is]
longstanding judicial view.”121 Certainly the current version of § 1391(c)(1), which literally brings some alien defendants within the scope of the venue statutes, is more than “the slightest indication” of Congress’s dissatisfaction.

Second, the practical result of leaving Brunette untouched, especially in view of TC Heartland, is that natural-person aliens sued for patent infringement will be denied a venue defense, which directly contravenes Congress’s intent. Recall that TC Heartland held that the definition of corporate residence under § 1400(b) must be the same today as it was understood at the time of Fourco because “the [1988 and 2011] amendments to § 1391 did not modify the meaning of § 1400(b) as interpreted by Fourco.”122 To maintain consistency, then, the definition of a natural person’s residence under § 1400(b) must necessarily be the same today as it was understood at the time of Fourco. Now, at the time of Fourco, natural persons were deemed to reside in a judicial district only if they were domiciled there and were a citizen of the United States.123 But, according to Brunette, “an alien defendant is by definition a citizen of no district.”124 Indeed, since at least 1952, alienage has always been defined in terms of citizenship, not domicile or residence.125 So, if Brunette stands, a natural-person alien domiciled in the United States could be sued today for patent infringement in any judicial district, notwithstanding the venue defense granted in § 1391.

Therefore, permanent resident aliens in patent cases would be denied venue protection if the current implications of Brunette and TC Heartland are allowed to materialize. However, this would utterly contravene the apparent purpose of the 2011 Venue Clarification Act.126 Since Congress articulated no principled reason or desire to give venue defenses to permanent resident

121 Id. at 710-11 (emphasis added).
123 See infra Section III.C; see also McInerney & Morgan, supra note 111, at 22 (“Previously, permanent resident aliens domiciled in the U.S. were treated the same as nonresident aliens for purposes of being barred from raising a venue defense.”).
124 Brunette, 406 U.S. at 709.
125 See 8 U.S.C. § 1101(3), (22) (1952) (defining “alien” as “any person not a citizen or national of the United States,” and “national of the United States” as “a person who, though not a citizen of the United States, owes permanent allegiance to the United States”); see also 8 U.S.C. § 1101(1), (22) (1970) (same); 8 U.S.C. § 1101(3), (22) (2012) (same); 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3810 (4th ed. 2013) (“Under the law as it existed before the [2011 Venue Clarification Act], venue in a suit against an alien—whether a resident or nonresident of the United States—could be brought in any district.”); McInerney & Morgan, supra note 111, at 22 (“Previously, permanent resident aliens domiciled in the United States were treated the same as nonresident aliens for purposes of being barred from raising a venue defense.”).
126 See H.R. REP. NO. 112-10, at 23 (2011) (“The proposed statute would grant a venue defense to permanent resident aliens who are domiciled in the United States.” (emphasis added)); id. at 20 (“[P]roposed subsection 1391(c) would apply to all venue statutes [sic], including venue provisions that appear elsewhere in the United States Code [which includes § 1400(b)].” (emphasis added)).
aliens in all cases except patent suits, reaffirming Brunette would amount to a blatant slap in the face to Congress.

Admittedly, however, since the TC Heartland Court seemed unconcerned with ignoring Congress’s intent that § 1391(c)(2), which defines corporate residence generally, apply to all venue statutes throughout the entire United States Code, perhaps it will be similarly unconcerned with ignoring Congress’s intent regarding § 1391(c)(1), which defines natural-person residence generally.

B. Brunette Overruled

A second way for the Court to theoretically resolve the problem discussed in Section II.C is to completely overrule Brunette. After all, Brunette primarily relied on the fact that “Congress ha[d] never given the slightest indication that it [was] dissatisfied with th[e] longstanding judicial view” that aliens are beyond the protection of the venue laws. 127 However, the very text of current § 1391(c)(1) provides that “a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled.” 128 Moreover, the congressional purpose behind this unambiguous text was to “change venue law by shifting the focus from ‘alienage’ of a defendant to whether the defendant has his or her ‘residence’ outside the United States,” thereby “permit[ting] permanent resident aliens domiciled in the United States to raise a venue defense.” 129 In other words, Congress has given much more than “the slightest indication” that it is dissatisfied with the view that all aliens are outside the venue laws. So, Brunette’s reasoning is no longer accurate, which arguably calls for it to be overruled. In such case, foreign defendants sued for patent infringement would be subject only to § 1400(b). 130

The main problem with this resolution, however, is that it risks creating venue gaps: “cases in which the federal courts have jurisdiction but there is no district in which venue is proper.” 131 Normally, venue gaps in general are eliminated by § 1391(b)(3), which provides that, “if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction suffices.” 132 Additionally, § 1391(c)(3), providing that “a defendant not

127 Brunette, 406 U.S. at 710-11.
130 See TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1518-20 (2017) (recounting with approval the holdings of Stonite and Fourco that § 1400(b) is the sole and exclusive provision governing venue in patent suits).
131 Brunette, 406 U.S. at 710 n.8.
132 § 1391(b)(3).
resident in the United States may be sued in any judicial district,” eliminates venue gaps specifically with respect to nonresident defendants. These sections, however, are apparently not applicable to patent suits since no part of § 1391 may supplement § 1400(b), as amply explained in Stonite, Fourco, and TC Heartland. Furthermore, the general principle underlying § 1391(c)(3)—that aliens/nonresidents are beyond the venue laws—no longer applies to patent suits since this analysis assumes that Brunette is overruled. Thus, foreign corporate defendants, which are by definition not incorporated in the United States, that are sued for patent infringement would be subject only to § 1400(b) and would be immune from suit if they had no regular and established place of business, or if that place of business was not located in the district where infringement occurred. Indeed, respondents and several amici in TC Heartland made this exact argument.

Since Brunette itself recognized the desirability of construing statutes to avoid such venue gaps, completely overruling Brunette seems unwise. Moreover, while it is possible for the Court to overrule Brunette and

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133 § 1391(c)(3).
134 See § 1400(b) (providing proper venue in patent suits where the defendant resides, or where the defendant has a regular and established place of business and has committed acts of infringement); TC Heartland, 137 S. Ct. at 1517 (holding that “a domestic corporation ‘resides’ only in its State of incorporation for purposes of the patent venue statute”).
135 See Brief for Respondent, supra note 94, at 24 (“[Under Heartland’s position,] suits against many foreign defendants would be literally impossible.”); id. at 13 (“Heartland’s view would therefore overturn Brunette and leave no district where a foreign defendant ‘resides.’”); id. at 26 (“Heartland’s statutory interpretation produces a muddle in cases with foreign defendants. If Section 1391(c)’s definition of residence does not apply, then there would be no proper venue in some cases under Section 1400(b). If ‘residence’ in Section 1400(b) were limited to the defendant’s place of incorporation, then a foreign corporation could not be sued anywhere in the United States, unless it had a ‘regular and established place of business’ in some district and committed infringement there.”); Brief of Amici Curiae Eighteen Individuals & Organizations Representing Inventors & Patent Owners in Support of Respondent, supra note 95, at 3-4 (“[A] foreign defendant not incorporated in the United States, and with no regular and established place of business in the United States, would not be the subject of proper venue for a suit for patent infringement in any court in the United States—hardly a result Congress would have intended—to immunize foreign infringers . . . .” (emphasis omitted)); Brief of Amicus Curiae Genentech, Inc. in Support of Respondent at 15 n.7, TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137. S. Ct. 1544 (2017) (No. 16-341) (“This statutory interpretation risks creating a venue framework under which there would be no proper venue in which to sue certain foreign corporations.”); Brief of Amici Curiae Guy Fielder et al. in Support of Respondent at 9, In re TC Heartland LLC, 821 F.3d 1338 (Fed. Cir. 2015) (No. 16-105) (“Petitioner’s argument leads to a nonsensical consequence – it would prevent all actions against foreign infringers in U.S. Courts.”).
136 See Brunette, 406 U.S. at 710 n.8 (“Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.”); see also Shearman & Sterling LLP, supra note 112 (discussing the “natural reluctance [of the Court] to find that . . . Congress accidentally immunized alien corporations with no U.S. place of business from suit in patent cases”).
simultaneously eliminate venue gaps by defining “residence” differently for foreign corporations than for domestic corporations,\textsuperscript{137} what such a definition might look like is beyond the scope of this Comment.

\textbf{C. Brunette Tweaked}

Finally, a third approach for the Court to theoretically resolve the problem discussed in Section II.C is to appropriately tweak the holding and reasoning of \textit{Brunette}. Specifically, the Court could recognize that Congress has manifested an intent to shift the focus of all venue laws from alienage/citizenship to domicile/residence, as evidenced by the 2011 Venue Clarification Act and accompanying House Report, already amply explained above.\textsuperscript{138} In other words, the Court would simply change the holding of \textit{Brunette} from stating that all aliens are outside the protection of the venue laws to stating that all nonresidents are outside the protection of the venue laws. This seemingly minor change would arguably be justified since “[t]he current provision of § 1391(c)(3) reflects the same [venue-gap-eliminating] substance [as] the alien venue provision that \textit{Brunette} addressed.”\textsuperscript{139} After all, the only substantive difference between the two provisions is the replacement of the word “alien” with the phrase “defendant not resident in the United States.”\textsuperscript{140} However, this approach would seem to violate \textit{TC Heartland}, as well as \textit{Stonite} and \textit{Fourco}, because a change in the meaning of § 1400(b) is being assumed merely from a change in § 1391.\textsuperscript{141}

Herein lies the dilemma. As explained above, it would amount to a slap in the face to Congress for the Court to hold that natural-person aliens domiciled in the United States could not raise venue defenses in patent suits.\textsuperscript{142} After all, Congress clearly abrogated the longstanding rule that all aliens are beyond venue protection in favor of the rule that only nonresidents are beyond such protection.\textsuperscript{143} However, to alter the meaning of § 1400(b) based on these amendments to § 1391 would seem to blatantly contravene \textit{TC Heartland}.

\textsuperscript{137} Such a redefinition is possible since the Court was noticeably careful to limit its \textit{TC Heartland} decision to “domestic” corporations only. 137 S. Ct. at 1520 n.2.
\textsuperscript{138} See supra subsection II.C.2.
\textsuperscript{139} Fish & Richardson, supra note 89.
\textsuperscript{140} Compare 28 U.S.C. § 1391(c)(3) (2012) (“[A] defendant not resident in the United States may be sued in any judicial district . . . .” (emphasis added)), with 28 U.S.C. § 1391(d) (1970) (“An alien may be sued in any district.” (emphasis added)).
\textsuperscript{141} See \textit{TC Heartland}, 137 S. Ct. at 1517 (“[T]he amendments to § 1391 did not modify the meaning of § 1400(b) as interpreted by \textit{Fourco}.”).
\textsuperscript{142} See supra Section III.A.
Thus, a compelling justification would be needed to explain why the amended definition of natural-person residence in § 1391(c) applies to § 1400(b) while the definition of corporate residence in § 1391(c) does not.

The difficulty with finding such a justification is exacerbated by the fact that the available evidence of congressional intent regarding these definitions is the same. In all these cases—natural-person residence, corporate residence, and nonresidence—only § 1391 was amended, and the Court in TC Heartland made clear that “the amendments to § 1391 did not modify the meaning of § 1400(b) as interpreted by Fourco.”

Despite this difficulty, a potential justification is available. First, the Court could rule that TC Heartland dealt only with the definition of corporate residence, not with the definition of natural-person residence or with nonresidence generally. Thus, the seemingly broad proclamation that “the amendments to § 1391 did not modify the meaning of § 1400(b)” can be confined only to the amendments to § 1391(c)(2), which defines corporate residence, rather than to the entirety of § 1391. Having recognized that TC Heartland considered only Congress’s intent as manifested in the amendment to § 1391(c)(2), the Court would be free to separately consider Congress’s intent as manifested in the amendments to § 1391(c)(1) and (c)(3).

Admittedly, restricting TC Heartland in this way does seem somewhat questionable since TC Heartland’s textual analysis focused primarily on the phrases “[e]xcept as otherwise provided by law” and “[f]or all venue purposes,” which apply generally to all three subsections of § 1391(c). Thus, TC Heartland’s holding on its face arguably applies to all the amendments to § 1391(c)—the provision defining natural-person residence, the provision defining corporate residence, and the provision stating that nonresidents lack venue protection. But, as explained above, such an interpretation would deny venue protections to natural-person aliens, which seems like an entirely ridiculous result given Congress’s exceedingly clear manifestation of intent to shift the focus of venue law from citizenship to domicile. Moreover, the practice of slightly narrowing precedent cases to achieve reasonable results in current cases is not new in the law.

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144 See TC Heartland, 137 S. Ct. at 1518-20 (recounting with approval the holdings of Stonite and Fourco that the patent venue statute is the sole and exclusive provision controlling venue in patent suits, not to be supplemented in any way by the general venue statute).
145 Id. at 1517.
146 See id. (“We therefore hold that a domestic corporation ‘resides’ only in its State of incorporation for purposes of the patent venue statute.” (emphasis added)).
147 See id. at 1520-21.
148 See supra Section III.A (explaining that denying venue defenses to natural-person aliens in patent suits would essentially amount to slapping Congress in the face).
149 See e.g., Berghuis v. Thompkins, 560 U.S. 370, 383-84 (2010) (discussing the requirements of the famous Miranda warnings from constitutional criminal procedure, and noting that, although
inferred regarding the fate of Brunette after TC Heartland, it is worth noting how
careful the Court was to avoid reaffirming Brunette. This care arguably leaves
room for the holding of TC Heartland to stand while that of Brunette is changed.

Now free to separately consider the impact of the amendments to § 1391(c)(1) and (c)(3), the Court could ultimately conclude that Congress’s
amendments to these provisions signaled a much stronger intention to change
the meaning of § 1400(b) than did the amendment to § 1391(c)(2). To do so,
the Court could analyze the historical relationship between the general and
patent venue statutes as explained below.

Recall that, since 1948—excluding the nearly thirty years during which VE
Holding controlled—the general and patent venue statutes had different
definitions of corporate residence. As explained above, Congress both recodified
§ 1400(b) and enacted § 1391 in 1948. At the time, a corporation under § 1391(c)
resided in its state of incorporation, or where it was licensed to do business or was
doing business. Under § 1400(b), on the other hand, it was understood that a
corporation resided only in its state of incorporation. Thus, § 1391 and § 1400(b)
had different, inconsistent definitions of corporate residence at their inceptions.
Forty years later, Congress amended § 1391(c) to provide that a corporation resides
wherever it is subject to personal jurisdiction. Although VE Holding held that
this definition then applied to § 1400(b), TC Heartland overruled the Federal
Circuit and held that, for patent purposes, a corporation still resides only where it
is incorporated, notwithstanding the different definition of corporate residence in
§ 1391. Therefore, it has been historically normal to have different definitions of
corporate residence under the general and patent venue statutes.

“[s]ome language in Miranda could be read to indicate that waivers are difficult to establish” and
that “a heavy burden rests on the government to demonstrate waiver of one’s Miranda rights, the
Court’s subsequent cases have reduced the impact of the Miranda rule,” have “stated that this ‘heavy
burden’ is not more than the burden to establish waiver by a preponderance of the evidence,” and
have “therefore ‘retreated from the language and tenor of the Miranda opinion’” (internal quotation
marks omitted) (first quoting Miranda v. Arizona, 384 U.S. 436, 475 (1966); then quoting Dickerson
v. United States, 530 U.S. 428, 443 (2000); and then quoting Connecticut v. Barrett, 479 U.S. 523,
531 (1987) (Brennan, J., concurring)).

150 See TC Heartland, 137 S. Ct. at 1520 n.2 (“We do not here address [foreign corporate venue],
nor do we express any opinion on this Court’s holding in Brunette . . . (determining proper venue
for foreign corporation under then existing statutory regime).” (emphasis added)).
151 See supra Part I.
154 See Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 226 (1957) (holding that, in
relation to a corporation, the word “resides” “mean[s] the state of incorporation only”).
155 Act of Nov. 19, 1988, Pub. L. No. 100-702, § 1013(a), 102 Stat. 4642, 4669 (codified as
amended at 28 U.S.C. § 1391(c) (2012)).
applied to domestic corporations, ‘residence’ in § 1400(b) refers only to the State of incorporation.
Accordingly, we reverse the judgment of the Court of Appeals . . . .”).
The same cannot be said for the definitions of natural-person residence or for the treatment of aliens in general. After all, the original venue statute in 1789 defined venue for all defendants in terms of inhabitance,\textsuperscript{157} the 1948 venue amendments shifted the focus of both the general and patent venue statutes from inhabitance to residence,\textsuperscript{158} and both Congress and the Court recognized that inhabitance and residence are “synonymous words [that] mean domicile.”\textsuperscript{159} Thus, since the general and patent venue statutes both used the word inhabitance prior to 1948 and residence after 1948,\textsuperscript{160} they have both always treated venue as proper where a natural-person defendant is domiciled. However, they also have always required that the natural-person defendant be a U.S. citizen.\textsuperscript{161} Therefore, while it has been historically normal for the general and patent venue statutes to have different definitions of corporate residence, it has been historically normal for them to have the same definition of natural-person residence—that is, domicile and citizenship.

So, the amendments to § 1391(c)(1) and (c)(3) arguably manifested a much clearer and stronger congressional intent to modify the meaning of § 1400(b) than did the amendment to § 1391(c)(2). In other words, Congress’s act of changing the definition of corporate residence under the general venue statute did not really signal an intent to work the same change in the patent venue statute because those two statutes had always had different definitions of corporate residence anyway. On the other hand, Congress’s act of changing the definition of natural person residence—by dropping the citizenship requirement—and generally shifting the focus of venue law from alienage to domicile under the general venue statute arguably signaled an intent to work the same changes in the patent venue statute because those statutes, although separate, had always had the same definition of natural-person residence. Indeed, since the rule prohibiting aliens from invoking venue protections applied universally throughout all the federal venue provisions,\textsuperscript{162} Congress’s clear

\textsuperscript{157} Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.
\textsuperscript{158} Act of June 25, 1948, ch. 646, §§ 1391(c), 1400(b), 62 Stat. 935, 935-36.
\textsuperscript{159} \textsuperscript{Fourco Glass Co. v. Transmirra Prods. Corp.}, 353 U.S. 222, 226 (1957).
\textsuperscript{160} See supra Part I (discussing the history of the general and patent venue statutes and identifying their wordings both before and after 1948).
\textsuperscript{161} See In re Hohorst, 150 U.S. 653, 662 (1893) (finding that venue protections were “inapplicable to an alien or a foreign corporation”); see also Brunette Mach. Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 709, 714 (1972) (reaffirming the “long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special,” because “an alien defendant is by definition a citizen of no district”); 14D WRIGHT ET AL., supra note 125, § 3810 (“Under the law as it existed before the [2011 Venue Clarification Act], venue in a suit against an alien—whether resident or nonresident of the United States—could be brought in any district.”).
\textsuperscript{162} See Brunette, 406 U.S. at 714 (reaffirming “the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special”).
abrogation of that rule arguably applies universally—that is, to both the general and special venue statutes—as well.\textsuperscript{163}

Although definitely not immune from criticism, this justification is based on factual observations and would arguably satisfy \textit{TC Heartland}'s concern with a clear congressional intent being conveyed by the text of the amended statute—after all, the statutory text and its historical evolution, by themselves, support this Comment's proffered justification, even if the compelling legislative history is ignored.\textsuperscript{164} Even though one attempting to show that no definitional change occurred could argue that natural-person residence had always meant domicile, the Venue Clarification Act explicitly eliminated the citizenship requirement for venue protection. Again, prior to the 2011 Act, to reside as a natural person meant to be a citizen domiciled in the United States;\textsuperscript{165} now, to reside as a natural person simply means to be lawfully domiciled in the United States.\textsuperscript{166} Thus, the citizenship requirement has been dropped and so the definition of natural-person residence has, in fact, changed. Ultimately, this suggested resolution would yield a (somewhat) cohesive framework for determining proper patent venue. Domestic corporations would reside in their state of incorporation; foreign corporations would be nonresidents and would therefore lack venue defenses; natural persons, whether aliens or citizens, domiciled abroad would lack venue protection; and natural persons, whether aliens or citizens, domiciled in the United States would be within the venue laws. These are sensible, practical results obtained while simultaneously respecting both the 2011 Venue Clarification Act and \textit{TC Heartland}.

\textbf{CONCLUSION}

This Comment has examined some problems and inconsistencies currently plaguing the law of patent venue. It began with a brief examination of the history of the general and patent-specific venue statutes in Part I. It then continued in Part II with an in-depth investigation of the facts, holdings, and reasonings of \textit{TC Heartland} and \textit{Brunette}, the Court’s two most relevant decisions regarding patent venue. Part II further identified the apparent tensions between these two cases and the weakness of \textit{Brunette} in light of the 2011 Venue Clarification Act. Finally, in Part III, this Comment explored

\begin{footnotesize}
\textsuperscript{163} See H.R. REP. NO. 112-10, at 22 (2011) ("[The 2011 Act] would change venue law by shifting the focus from 'alienage' of a defendant to whether the defendant has his or her 'residence' outside the United States." (emphasis added)); see also id. at 20 ("[S]ubsection 1391(c) would apply to all venue statutes [sic], including venue provisions that appear elsewhere in the United States Code." (emphasis added)).

\textsuperscript{164} See \textit{TC Heartland LLC v. Kraft Foods Grp. Brands LLC}, 137 S. Ct. 1514, 1520 (2017) ("When Congress intends to [implicitly amend one statute by directly amending another], it ordinarily provides a relatively clear indication of its intent in the text of the amended provision.").

\textsuperscript{165} See supra note 161 and accompanying text.

\textsuperscript{166} 28 U.S.C. § 1391(c)(1), (2) (2012).
\end{footnotesize}
three potential resolutions by which the Court could address these issues, including reaffirming, overruling, and tweaking Brunette.

Ultimately, this Comment argues that the best solution available to the Court is to adjust the holding of Brunette, which currently states that all aliens lack venue protections, to state that all nonresidents lack venue protections. Although this seemingly contradicts the clear holding of TC Heartland—by supplementing the meaning of § 1400(b) with § 1391—a factually based justification for such an analytical move was presented. Since it has been historically normal for § 1391 and § 1400(b) to have different definitions of corporate residence, Congress’s act of amending the definition of corporate residence in § 1391 did not signal an intent to work the same change in § 1400(b). Because, on the other hand, it has been historically normal to have the same definition of natural-person residence in § 1391 and § 1400(b), Congress’s act of amending the definition of natural-person residence and shifting the focus of venue law from alienage to domicile in the general venue statute arguably signaled a much stronger congressional intent to work the same change in the patent-specific venue provision.