duct harms the competitive process in the absence of a legitimate business justification."[107]

In *Monsanto Co. v. Spray-Rite Service Corp.*, the Supreme Court observed that a business "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."[108] In a similar case decided one year later, the Court elaborated that "the long recognized right . . . [to] freely exercise [one's] own independent discretion as to parties with whom [it] will deal" did not automatically violate the Sherman Act,[109] but that in viewing the totality of the defendant's actions, it was exclusionary—and thereby anticompetitive—for the monopolist to unilaterally refuse to continue a "pattern of distribution that had originated in a competitive market and had persisted for several years."[110] Unlike the showing of an injury to an *individual* competitor embraced in the price discrimination context, however,[111] "in determining whether conduct is exclusionary in the context of a [section two] claim, [the court] ordinarily focus[es] on harm to the competitive *process* . . . ."[112]

It is unclear from the parties' motions and filings to just what extent EOSAT's refusal to deal with EarthSat as a party entitled to the standard twenty-percent discount could have constituted a harm to the overall "competitive process" or market for *Landsat* data tapes. In the event this could even have been quantified, however, EOSAT could have easily argued that "the pattern of distribution that had originated in a competitive market and had persisted for several years"[113] still contained over fifty different sales representatives[114] and that EarthSat's exclusion from this preferential cost scheme did not unduly prejudice the end consumer. Additionally, both parties agreed in their supporting motions that EarthSat was still entitled to

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[107] Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997).

[108] 465 U.S. 752, 761 (1984).

[109] Aspen Skiing Co. v. Aspen Highlands Skiing Co., 472 U.S. 585, 602 (1985).

[110] *Id.* at 603.

[111] *See supra* note 99.

[112] Data General Corp. v. Grumman Systems Support Corp., 36 F.3d 1147, 1185 (1st Cir. 1994).

[113] *See supra* note 110.

[114] *See supra* note 96.

purchase *Landsat* tapes, albeit without the price discount,[115] so the argument could also be raised that EOSAT did not in fact refuse to "deal" with EarthSat, but merely refused to deal with it on such previously favorable terms. Quoting *Volvo Trucks* again, the antitrust laws do not "ban all price differences"[116] and under *Monsanto Co.*, a business generally can "deal, or refuse to deal, with whomever it likes, as long as it does so independently."[117]

CONCLUSION

The world has changed a considerable amount since D. M. Mickey wrote his article on trusts in the 1888 American Law Review. Although we may no longer fear the power of the upholsterer's felt trust or the lead-pencil and coffin cartels,[118] the economic realities of the Twenty-First Century bring their own challenges for us to consider. With the rise of a global economy more connected than ever before and the increasing political demands on the treasuries of most Nation-States, the privatization of formerly public areas of government policy offers one solution to the challenging realities of fiscal scarcity. In the Seventeenth-Century Netherlands, the decision was made to grant a monopoly to a private corporation so that national and economic power might be expanded across the world.[119] Three hundred and eighty-two years later, the United States made a similar decision to privatize part of its remote sensing policy through the grant of a sole-source contract to EOSAT for the operation of the *Landsat* system.[120]

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[115] *See supra* note 59.

[116] 546 U.S. at 176.

[117] *See supra* note 108.

[118] *See supra* note 40, at 540.

[119] *See supra* note 2.

[120] *See supra* note 10. Although this privatization was short-lived, the fact that it occurred at all illustrates the *Landsat* program's importance to U.S. remote sensing efforts since Congress could have easily voted during the 1980s to not continue funding. Even though "[t]he Office of Science and Technology ("OSTP") eliminated the . . . option for a public-private partnership due to 'the lack of viable commercial markets for *Landsat* data'" the importance of *Landsat* data continuity also caused the OSTP to "announce[] further that the Government will 'transition the *Landsat* program from a series of independently planned missions to a sustained operational program . . . .'"

Even though it ultimately settled out of court, the dispute between EOSAT and EarthSat offers a unique perspective on the prospective antitrust liability of a federally-supported monopoly. Although Congress through the Sherman Act has clearly established its general disdain for monopolistic entities,[121] it has also demonstrated that certain monopolies are permissible and even necessary to advance the national well-being.[122] From the Private Express Statutes granting the Postal Service its monopoly over the carriage of letters to the Atomic Energy Act's sweeping revocation of patents and intellectual property rights on fissionable technology, certain institutional functions have historically been deemed important enough to warrant monopoly protection. Given the statutory phrasing and political rationale behind the Land Remote Sensing Policy Act and the earlier Commercialization Act of 1984, EOSAT's sole-source *Landsat* contract would almost certainly have been found to be a similarly-important federally-supported monopoly.

Despite this protected monopoly or sole-source status, however, there is an argument that EOSAT could have been found guilty of engaging in certain anticompetitive conduct. Unlike an agency of the U.S. Government needing to utilize fission technology patented prior to the 1946 Atomic Energy Act, EOSAT was a completely private entity—albeit an entity empowered to fulfill a formerly-sovereign function. This distinction is a critical one since, for example:

> the Postal Service [has] a high degree of independence from other offices of the Government, but it remains part of the Government. The Sherman Act defines "person" to include corporations, and had the Congress chosen to create the Postal Service as a federal corporation, we would have to ask whether the Sherman Act's definition extends to the federal entity under this part of the definitional text. Congress, however, de-

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Gabrynowicz, *supra* note 10, 6 CHI. J. INT'L L. at 60-61. Despite the early political desire to fully commercialize the *Landsat* program, fiscal reality ultimately dictated that a federally-supported monopoly grant be used until the program could be re-grafted into the public sector under a definitive mission structure.

[121] *See supra* note 45.

[122] *See supra* note 46.

> clined to create the Postal Service as a Government corporation, opting instead for an independent establishment.[123]

Given that the aforementioned language of *Flamingo Industries* suggests that even a *federally-created* corporation might be subject to the Sherman Act's reach, there seems to be little question that it would certainly extend to a private corporation holding a sole-source contract.

Although there is little doubt that a private corporation like EOSAT holding a federal contract could be subject to the antitrust laws, the question still remains of what remedy EarthSat would have been entitled to receive. Under the *Volvo Trucks* test, EarthSat would have still needed to prove each of the four elements in order to demonstrate that EOSAT had engaged in secondary-line discrimination, and as previously mentioned in the analysis, on at least two of those points it would have faced a sizeable amount of difficulty. On top of this difficulty, EarthSat would also have needed to prove that EOSAT sold its products to the other distributors below an appropriate measure of cost, and given the lack of inquiry into this specific area—or similar mention in the pleadings for that matter—this is likely doubtful. Although EarthSat could have raised a refusal to deal claim as part of its attack on EOSAT's pricing scheme, the potential success of this strategy seems questionable at best given that EOSAT was still "dealing with" the company; it simply was not extending the full set of terms it offered to others. Thus, although this case suggests that a private concern is not immune from antitrust liability simply by virtue of being a federally-supported monopoly, the facts of this particular matter suggest that had it proceeded to trial, EOSAT would have prevailed.

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[123] U.S. Postal Service v. Flamingo Industries (USA) Ltd., 540 U.S. 736, 746 (2004).

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