

MARQUETTE UNIVERSITY LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES
RESEARCH PAPER NO. 14-22



MARQUETTE
UNIVERSITY

LAW SCHOOL

**The Sports Broadcasting Act of 1961: A Comparative
Analysis of its Effects on Competitive Balance in the NFL
and NCAA Division I FBS Football**

39 OHIO NORTHERN UNIVERSITY LAW REVIEW __ (2013)

Matthew J. Mitten & Aaron Hernandez

This paper can be downloaded without charge from the Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=2458433>.

Matthew J. Mitten
Professor of Law
Director, National Sports Law Institute
Marquette University Law School
Eckstein Hall
P.O. Box 1881
Milwaukee, Wisconsin 53201-1881

The Sports Broadcasting Act of 1961: A Comparative Analysis of its Effects on Competitive Balance in the NFL and NCAA Division I FBS Football

MATTHEW J. MITTEN* AND AARON HERNANDEZ**

I. INTRODUCTION

One of the relatively few sports-specific statutes¹ enacted by Congress or a state legislature is the Sports Broadcasting Act of 1961 (“SBA”),² which exempts a professional sports league’s collective sale of its member teams’ television rights to free “over-the-air” national and regional broadcasters³ from antitrust challenges.⁴ This federal legislation was enacted in response to a 1953 United States Department of Justice antitrust suit challenging National Football League (“NFL”) bylaws which prohibit league teams from televising games in another team’s home territory.⁵ This suit resulted in a 1961 federal district court ruling that prohibited the NFL from collectively selling its teams’ television rights.⁶ Since the SBA was enacted, the NFL has collectively and exclusively sold all of its teams’ television rights and distributed the net revenues on a pro rata basis to each team. This form of horizontal revenue sharing among league teams is positively correlated to a significant degree of on-field competitive balance among NFL teams from 1962-2012. In addition, the NFL’s successful pro rata revenue sharing model, which was significantly facilitated by the SBA, is the genesis of the currently common practice of other North American major professional sports leagues (e.g., Major League Baseball (“MLB”), the National Basketball Association (“NBA”), and the National Hockey League (“NHL”)) to centrally sell or license all or part of their respective member teams’ television, trademark, and Internet rights and to distribute the revenues pro rata as means of promoting competitive balance.⁷

Part II of this article briefly describes the federal government’s antitrust litigation against the NFL arising out of its restrictions on the telecasting of its teams’ games and summarizes the scope of the SBA’s antitrust exemption, legislative history, and objectives.⁸ Although the SBA provides a limited antitrust exemption for the collective sale of television rights by a professional sports league,⁹ it does not immunize the National Collegiate Athletic Association (“NCAA”)’s collective sale of football television rights from antitrust scrutiny.

* Professor of Law and Director, National Sports Law Institute and LL.M. in Sports Law Program for Foreign Lawyers, Marquette University Law School.

** B.B.A., University of Notre Dame 2010; J.D., Marquette University Law School 2013.

1. There are relatively few sport-specific federal statutes; for example, the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §220501, et seq; Sports Agent Responsibility Trust Act, 15 U.S.C. §§7801 et seq.; Sports Broadcasting Act of 1961, 15 U.S.C. §§1291 et seq.; Equity in Athletics Disclosure Act, 20 U.S.C. §1092; Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. §3701, et seq; the Bribery in Sporting Contests Act, 18 U.S.C. §224; Professional Boxing Safety Act of 1996, 15 U.S.C. §§6301 et seq.; Muhammad Ali Boxing Reform Act, 15 U.S.C. §6307a-h ; and the Curt Flood Act of 1998, 15 U.S.C. §26b. Similarly, there are only a few sport-specific state statutes, which include athlete agent statutes (e.g., ORC 4771.01), youth sports concussion statutes (e.g., ORC 3707.511) and some laws limiting or establishing tort liability standards (e.g., Illinois Baseball Facility Liability Act, 745 ILCS §38/10).

2. 15 USC §1291 (2006).

3. See supra notes 25-27 and accompanying text.

4. 15 U.S.C. § 1291.

5. United States v. Nat’l Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

6. United States v. Nat’l Football League, 196 F. Supp. 445 (E.D. Pa. 1961).

7. Financial stability of their respective teams and competitive balance within major professional sports leagues outside of the U.S. also may be enhanced by collectively selling league teams’ television rights and sharing the revenues. For example, Miguel Cardenal, Spain’s Secretary for Sport, has stated that a new Spanish law will require La Liga soccer teams “to negotiate the sale of television rights collectively as in other major European leagues.” Currently, individual teams individually sell their television rights, with Real Madrid and Barcelona, the two most popular teams, splitting approximately half of the annual television revenues. Cardenal said the teams would have the freedom to decide how the revenues are distributed, but he indicated “it would be natural to expect the gap between those who get the most and those who get the least to narrow.” *Spain Planning New Law To Force Collective Bargaining For TV Revenue*, SportsBusiness Daily Global, April 19, 2013.

8. See *infra* Part II.

9. 15 USC §1291. The Act also immunizes the collective sale of television rights by the National Basketball League, National Hockey League, and Major League Baseball from antitrust liability. *Id.*

Part III surveys recent economic literature concerning the effects of revenue sharing on competitive balance within a professional sports league and evaluates the SBA's impact on competitive balance among NFL teams.¹⁰ Initially, we compare NFL teams' respective playoff appearances and league championships from 1953 through 1961—eight years prior to the enactment of the SBA when league teams sold television rights independently and retained the individual revenues—with 1962 through 1970—a corresponding period during which the league sold all television rights collectively and distributed their revenues pro rata. Next, we take a broader look at the overall degree of competitive balance in the NFL from 1962 through 2012, a fifty-year period during which the league's collective sale of television rights has been its largest single source of revenue sharing among its teams.

Part IV reviews the 1984 private antitrust litigation invalidating the NCAA's then-existing collective and exclusive sale of college football television rights,¹¹ which led to the subsequent prevailing practice of Division I Football Bowl Subdivision ("FBS") regional athletic conferences' collective sale of their members' college football television rights.¹² We compare Associated Press ("AP") Top 25 final college football season rankings and national championships with NFL teams' playoff appearances and league championships from 1985 through 2012, which shows that there has been much less competitive balance in FBS football vis-à-vis the NFL during this time period. This comparative analysis provides additional empirical support showing that the SBA, which enabled the NFL to collectively sell television rights and to embark on a more than fifty-year history of pro rata revenue distribution, has played a significant role in the league's efforts to maintain competitive balance among its teams.

II. GOVERNMENT ANTITRUST LITIGATION LEADING TO THE PASSAGE OF THE SPORTS BROADCASTING ACT OF 1961

Prior to the enactment of the SBA, NFL teams individually sold television broadcast rights to their respective home games and retained the revenues. To protect against the reduction of a team's home game ticket sales and the reduction of local viewership of its televised games, Article X of the NFL bylaws prohibited each team from permitting its games to be telecast into another team's home territory—encompassing a seventy-five-mile radius from the city where the team was located—without that team's consent, which generally was not given.¹³ Thus, Article X effectively permitted only the local NFL team's games to be telecast within its home territory, thereby preventing local viewers from watching televised NFL games in which the local team was not playing.

In *United States v. National Football League* ("NFL I"),¹⁴ a 1953 case that is the only sports industry antitrust suit ever filed by the federal government thus far, the Department of Justice alleged that Article X is an agreement that unreasonably restrains trade in the market for televised NFL games in violation of §1 of the Sherman Act¹⁵ and sought injunctive relief against the NFL's enforcement of this rule.¹⁶ The federal district court initially determined that this bylaw constitutes an agreement among NFL teams that affects interstate trade, which is subject to judicial scrutiny under §1.¹⁷ It characterized the NFL's telecasting restrictions as "a clear case of allocating marketing territories among competitors, which is a practice generally held illegal under the anti-trust laws,"¹⁸ but recognized that "[p]rofessional football is a unique type of business."¹⁹

The court explained:

10. See *infra* Part III.

11. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984).

12. See *infra* Part IV.

13. The NFL also prohibited a team's home game from being broadcast within its home market unless it was sold out.

14. 116 F. Supp. 319 (E.D. Pa. 1953).

15. 15 U.S.C. §1.

16. *United States v. Nat'l Football League*, 116 F. Supp. at 321.

17. *Id.* at 322.

18. *Id.*

19. *Id.* at 323.

Professional teams in a league, however, must not compete too well with each other, in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably

The winning teams usually are the wealthier ones and unless restricted by artificial rules the rich get richer and the poor get poorer Thus, the net effects of allowing unrestricted business competition among the teams are likely to be, first, the creation of greater and greater, inequalities in the strength of the teams; second, the weaker teams being driven out of business; and, third, the destruction of the entire League.²⁰

Because ticket sales constituted the largest component of an NFL team's revenues in the early 1950s, the court concluded that "[r]easonable protection of home game attendance is essential to the very existence of the individual teams, without which there can be no League and no professional football as we know it today."²¹ It ruled that Article X's prohibition against the telecasting of outside games into the home territories of other NFL teams when they are playing at home is a reasonable restriction, that it is necessary to maintain a team's financial viability, and that Article X has the pro-competitive effect of preserving the NFL's existence.²² However, the court also held that Article X's prohibition against the simultaneous telecasting of an outside game into a local NFL team's home territory when its away game is telecast would not adversely affect attendance at NFL games and, therefore, was an unreasonable restraint.²³ It enjoined the NFL and its teams from restricting the sale of television rights, although restricting the telecast of outside games into a team's home territory during a home game is permissible.²⁴

In 1961, the NFL entered into a contract with the Columbia Broadcasting System ("CBS") that granted CBS the exclusive right to televise all league games for two years for a \$4,650,000 annual license fee, which would be distributed pro rata to its member teams. This agreement gave CBS the sole discretion to determine which NFL games to televise and their respective broadcast areas. This was the first time that the NFL collectively sold its teams' television rights to home games, which each NFL team previously sold individually. The NFL petitioned the court for an interpretation of the final judgment resolving the 1953 antitrust litigation and validating its television contract with CBS, which the Department of Justice opposed.

On July 20, 1961, in *United States v. National Football League* ("NFL II"),²⁵ the same court ruled that the contract between the NFL and CBS was the product of an agreement between the NFL teams to eliminate economic competition among themselves for the sale of television rights to home games and it, therefore, violated the 1953 injunction prohibiting them from agreeing to restrict the geographical areas into which NFL games will be telecast except within a team's home territory when it is playing a home game.²⁶ Finding that the contract gave CBS the right and discretion to determine which games will be telecast and where, the court concluded:

Clearly this provision restricts the individual teams from determining "the areas within which * * * telecasts of games * * * may be made * * *," since defendants have by their contract given to CBS the power to determine which games shall be telecast and where the games shall be televised.

20. *Id.* at 323-324.

21. *NFL I*, 116 F. Supp. at 325.

22. *Id.* at 324-26.

23. *Id.* at 326-327. For the same reason, the district court ruled that Article X's prohibition against radio broadcasts of outside games into a team's home territories during its home games or telecast away games also unreasonably restrained trade. *Id.* at 327.

24. *Id.* at 330.

25. 196 F. Supp. 445 (E.D. 1961).

26. *Id.* at 447.

I am therefore obliged to construe the Final Judgment as prohibiting the execution and performance of [this] contract²⁷

NFL II prohibited the NFL from collectively selling its teams' television rights, an important and increasing source of league gross revenues that had risen from \$1,239,000 in 1953 to \$3,510,000 in 1961,²⁸ and distributing the net proceeds on a pro rata basis to each team, a form of revenue sharing to equalize the widely disparate value of each team's television contract.²⁹ This ruling had the potential to diminish league-wide competitive balance and to weaken the financial stability of some NFL teams, particularly those in very small markets such as Green Bay, adverse effects that threatened the NFL's long-term survival and were recognized by the court in *NFL I*.³⁰ Moreover, although the American Football League ("AFL"), a competing professional football league, and the NBA collectively sold their member teams' television rights without an antitrust challenge by the Department of Justice, *NFL II* precluded the NFL from doing so.

Congress swiftly overruled *NFL II* by enacting the SBA in September of 1961.³¹ It is ironic that the federal government's only sports industry antitrust suit led to Congressional enactment of one of the relatively few sports-specific federal laws in existence. The SBA immunizes from antitrust challenge a professional football, baseball, basketball, or hockey league's collective sale or transfer of "all or any part of the rights of such league's member teams in the sponsored telecasting of [their] games."³² The SBA's purpose is to "enable the member teams . . . to pool their separate rights in the sponsored broadcasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws."³³ However, the SBA does not require these revenues to be shared among league teams on a pro rata or any other basis.³⁴

The SBA's legislative history evidences congressional recognition that

a league needs the power to make "package" sales of the television rights of its member teams to assure the weaker teams of the league continuing television income and television coverage on a basis of substantial equality with the stronger teams. Such income and coverage . . . often mark the difference between profitable and losing operations.³⁵

During hearings before the Antitrust Subcommittee concerning this legislation, Joe Foss, the AFL commissioner, testified that "television revenues are such a significant part of the overall financial success of a professional football team that it is necessary to prevent too great disparity in the television income of the various clubs," which "requires the pooling of revenues and a package contract."³⁶ Because "the structure of the league would become impaired and its continued operation imperiled" if weaker teams floundered financially, the Antitrust Subcommittee concluded that "the public interest in viewing professional league sports warrants some accommodation of antitrust principles to avoid these consequences."³⁷

27. *Id.* at 447.

28. ABA Section of Antitrust Law, *Federal Statutory Exemptions From Antitrust Law* at 219 (2007).

29. *United States v. Nat'l Football League*, 196 F. Supp. at 446-47.

30. *See id.*

31. 15 U.S.C. § 1291, et seq. Congress amended the SBA in 1966 to permit the NFL and AFL to merge. 15 U.S.C. § 1291 (antitrust law "shall not apply to a joint agreement by which the member clubs of two or more professional football leagues . . . combine their operations in [an] expanded single league . . . if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.").

32. *Id.*

33. S. Rep. No. 1087, 87th Cong., 1st Sess., at 1 (1961).

34. *See* 15 U.S.C. § 1291.

35. H. R. Rep. No. 1178, 87th Cong., 1st Sess., at 1 (1961) [hereinafter H. R. Rep.]. For an argument that the SBA lacks any current procompetitive economic justifications from the perspective of consumers, see *Federal Statutory Exemptions From Antitrust Law*, *supra* note 19, at 238-240.

36. H. R. Rep., *supra* note 35, at 3.

37. *Id.* As one court observed, "The purpose of the SBA, as opposed to the purpose of the Sherman Act itself, was not to promote competition. It was to establish the legality of a practice which tends to restrain competition, package

Therefore, Congress provided professional football, baseball, basketball, and hockey leagues with an antitrust exemption to enable the sharing of television broadcast revenues among league teams.³⁸ This exemption has, in turn, contributed to each league's financial viability and competitive balance. In recognition of the unique nature of a professional sports league and the economic interdependence of its teams, the MLB, NBA, NFL, and NHL pooled rights telecasting contracts are immunized from antitrust scrutiny, which in turn has facilitated the prevailing practice of pro rata revenue sharing to enable all teams to receive an equal share of these collectively generated revenues.³⁹

However, the SBA's antitrust exemption provides immunity only for a professional sports league's collective sale of "sponsored telecasting" rights,⁴⁰ which has been narrowly interpreted by courts as not including subscription television provided via cable networks or satellite distributors⁴¹ in order to ensure the continuing availability of free national and local over-the-air telecasting of league games.⁴² Consistent with *NFL I*, the SBA does not provide antitrust immunity for any joint agreement that prohibits a purchaser of a league's pooled television rights from telecasting the games in a particular area "except within the home territory of a member team of the league on a day when such team is playing a game at home."⁴³ Thus, prohibiting telecasts of other league games into a team's home territory when it has a home game does not violate the antitrust laws; whereas, any other collective limits on the geographical scope of broadcasts of league games is subject to antitrust challenge.

III. THE RELATIONSHIP BETWEEN COMPETITIVE BALANCE, REVENUE SHARING, AND THE SBA

Professional sports leagues such as the NFL produce a unique product, namely games with an uncertain outcome, that necessarily requires competitive balance among the opposing teams, which is distinct from other forms of entertainment such as movies and theater that always have the same outcome or ending. Rodney Fort and James Quirk, two prominent sports economists, have noted that "[s]ports leagues are in the business of selling competition on the playing field" and "need to establish a degree of competitive balance on the field that is acceptable to fans."⁴⁴ Another sports economist, Allen Sanderson, observes that "producing and maintaining competitive balance is of paramount importance."⁴⁵ "Although there are some disagreements and ongoing debates about the extent of the problem and the efficacy of alternative correctives," he states "there is an arguable consensus about the desirability of [competitive] balance and the role that the distribution of financial resources plays in creating and maintaining it."⁴⁶

sales to the networks." *Chicago Prof'l Sports Limited Partnership v. NBA (Bulls I)*, 754 F. Supp. 1336, 1352 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992).

38. See 15 U.S.C. § 1291.

39. "National TV contracts in all sports uniformly involve equal sharing of such revenues by all league teams (with some negotiated, temporary exclusions for expansion franchises). In a one-team-one vote environment, equal sharing is more or less guaranteed because the national contract can be approved only if there is a virtual consensus among league teams. Weak-drawing teams can block unequal sharing proposals by refusing to permit televising of them involving them and the strong-drawing teams." Rodney Fort and James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 32 J. ECON. LITERATURE 1265, 1291 (Sept. 1995). "Strong-drawing teams, which contribute more audience than weak-drawing teams, certainly are subsidizing weak-drawing teams because each is receiving an equal share of national TV revenues." *Id.*

40. The legislative history states that the SBA's antitrust exemption "does not apply to closed circuit or subscription television." H. R. Rep., *supra* note 23, at 5.

41. See, e.g., *Shaw v. Dallas Cowboys Football Club, Inc.*, 172 F.3d 299, 300 (3d Cir. 1999) (package sale of television broadcast rights to satellite distributor not "sponsored telecasting" immune from antitrust scrutiny); *Chicago Prof'l Sports Ltd. Partnership v. NBA (Bulls III)*, 808 F. Supp. 646, 650 (N.D. Ill. 1992) ("sponsored telecasting" encompasses only "free television," such as "national network and local over-the-air broadcasting provided at no direct cost to viewers," not league's pooled television rights contract with cable television programming service).

42. However, an increasing number of professional sports league game packages are collectively sold to cable television networks such as ESPN or to satellite television providers. See, e.g., Matthew Futterman, *NFL, DirecTV Extend Pact in \$4 Billion Deal* at <http://online.wsj.com/article/SB123786503490122053.html> (last visited May 13, 2013).

43. 15 U.S.C. § 1292.

44. Fort and Quirk, *supra* note 26, at 1265.

45. Allen R. Sanderson, *The Many Dimensions of Competitive Balance*, 3 J. Sports Economics 204, 205 (May 2002) See also Stephan Kesenne, *Revenue Sharing and Competitive Balance in Professional Team Sports*, 1 J. Sports Economics 56, 56 (Feb. 2000) (Competitive balance "is an important element affecting public interest and the financial health of the industry of professional team sports.").

46. Sanderson, *supra* note 32, at 205.

Sports law professor Gary Roberts points out that “competitive balance” has the dual meaning of “parity,” i.e., the extent to which all teams playing at the same level are able to play close and exciting games during a season of competition, and “potential to change,” i.e., the teams’ ability to improve their relative performance in terms of on-field success vis-à-vis other teams over time.⁴⁷ Focusing on the second part of this definition, we consider “what has happened to competitive balance over time or as a result of changes in the business practices of pro sports leagues.”⁴⁸ In particular, we examine the correlation between the NFL’s collective sale of television rights and pro rata distribution of the revenues to its teams—a business practice the NFL adopted soon after congressional enactment of the SBA and continues to utilize—and league-wide competitive balance.⁴⁹ As a rough means of determining the existence of such a correlation,⁵⁰ we have compiled and compared information regarding NFL teams’ respective playoff appearances and league championships from 1953–1961, when NFL teams individually sold television rights and retained the revenues, and 1962–1970, a corresponding period during which the NFL collectively sold its teams’ television rights and distributed their revenues pro rata, along with corresponding data from 1962–2012. Admittedly, this is an imprecise measure because proving the existence of a causal relationship between the NFL’s collective sale of television rights and pro rata revenue distribution, which could not lawfully be done prior to passage of the SBA, and competitive balance with mathematical precision would require sophisticated economic analysis that considers and quantifies the effects of other relevant variables.⁵¹ Nevertheless, we believe it is sufficiently accurate to show this correlation and supports an inference that the SBA has been a significant contributing factor.

Sports economist Stephan Kesenne observes that the degree of competitive balance in a professional sports league “depends primarily on the distribution of playing talent among teams”⁵² and explains how revenue sharing among teams can improve competitive balance. In general, an individual team’s revenues are positively correlated with the success of its on-field performance, i.e., the number or percentage of games won, which largely depends on the quality of its players relative to those of other teams, i.e., teams with better players usually win more games during the season than those with inferior players.⁵³ In a competitive labor market, a profit-maximizing team will equate its aggregate player salaries with the marginal revenue of its players’ talent.⁵⁴ Because a team’s market size is the primary factor that determines its revenue-generating potential,⁵⁵ “the level of the demand for playing talent by the big teams is higher because of their larger market size.”⁵⁶ Absent any revenue sharing, large market teams will have a larger

47. Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 79 Tul. L. Rev. 2631, 2664-2665 (1996).

48. Rodney Fort and Joel Maxcy, “Competitive Balance in Sports Leagues: An Introduction,” 4 J. Sports Economics 154, 155 (May 2003).

49. We recognize that the NFL has derived very substantial revenues in recent years from the collective sale of its teams’ television rights to cable networks such as ESPN, which are not immunized from antitrust challenge by the SBA, and that the “SBA appears to have been rendered largely obsolete by changing economic circumstances and changing judicial application of antitrust law.” Federal Statutory Exemptions From Antitrust Law, *supra* note 19, at 217. Nevertheless, “The act did facilitate the introduction of comprehensive sharing of broadcast revenue among all the teams in professional football. That, in turn, may have facilitated greater sales of programming by reducing the transaction costs of revenue sharing. The sharing of this revenue as it has grown in importance has made it possible for teams such as those in Pittsburgh, Green Bay, and Buffalo, with relatively small home markets to survive and achieve parity with teams based in the largest markets.” *Id.* at 234.

50. Sanderson, *supra* note 32, at 223. (“Commonly employed yardsticks” to measure competitive balance within a professional sports league include “the distribution of championships, the correlation between pay and performance or winning percentage and market size, and the variance of won-lost percentages.”). We have included teams making the playoffs because the NFL’s league champion (i.e., the winner of the Super Bowl) is determined by a playoff system rather than by the team achieving the most regular season victories. See Fort and Quirk, *supra* note 26, at 1269 (observing that a championship playoff system increases the number of “‘successful’ teams from a single champion to all teams qualifying for the playoffs”).

51. For example, our analysis does not consider the effects of other current forms of revenue sharing (e.g., gate receipts, trademarked merchandise royalties), labor market restraints (e.g., draft, hard salary cap, free agency restrictions, and a ban on the cash sale of players), and other relevant variables (e.g., unbalanced scheduling pursuant to which teams with more wins and playoff success are given a more difficult schedule for the next season) on the degree of competitive balance in the NFL. The NFL formed NFL Properties in 1963 to collectively license third parties to sell merchandise such as clothing and headwear bearing the trademarks of its teams. The NFL draft began in 1936, cash sales of players have been banned since the early 1960s, free agency restrictions have existed since 1963, and there has been a “hard” salary cap since 1994.

52. Kesenne, *supra* note 32, at 56.

53. *Id.* at 57-59.

54. *Id.* at 59.

55. A team’s on-field success, closeness of its games, and quality of its opponent (all of which are preferred by its fans) also affect its revenue-generating potential. *Id.* at 57-58.

56. *Id.* at 60.

amount of aggregate player talent because they can afford higher player salaries, which will have corresponding adverse effects on competitive balance among league teams, particularly those in the smallest markets.

Kesenne observes that a team's "incentive to buy extra playing talent is less if the marginal revenue of the playing talent has to be shared with other clubs in the league," and it has been "generally accepted that revenue sharing does not affect the competitive balance in a league if clubs are profit maximizers," which is based on the assumption that each team's falling demand curve for the best players remains the same.⁵⁷ However, he notes that "the downward shifts of the demand curves will leave the distribution of playing talent among clubs unaffected only if the size of these shifts at the market equilibrium point are the same for all clubs."⁵⁸ In reality, the marginal revenue of aggregate player talent differs for each league team because its respective market size varies; therefore, "the downward shift of the labor demand function, due to revenue sharing, is different for each club" and "is larger for the big clubs [which] will reduce their demand for playing talent more than the small clubs."⁵⁹ In other words, because revenue sharing reduces large market teams' demand for high quality player talent and simultaneously increases small market teams' demand, by providing increased revenues to attract better, higher-paid players in an effort to increase their quality of play, number of wins, and total revenues, it results in "a more equal distribution of playing talent among the big and small clubs."⁶⁰

Relying on empirical evidence indicating that North American major professional sports league teams seek to win games rather than merely maximizing profits (i.e., at least to some degree, teams are willing to forego profits for wins), other more recent economic research also demonstrates that revenue sharing may increase competitive balance.⁶¹ Sports economists Helmut Dietl, Martin Grossman, and Markus Lang identify a new effect of revenue sharing which they call the "sharpening effect," which creates an incentive for weaker teams to invest in player talent and "proves to be an efficient instrument for improving competitive balance in an unbalanced league."⁶² Consistent with Kenessee, they show that revenue sharing has the potential to enhance competitive balance within a professional sports league, but caution that the actual effects of revenue sharing will vary based on league teams' respective preferences for winning and profitability as well as the impact that an increase in player talent will have on a particular team's marginal revenue.⁶³

Observing that "in reality, most [team] owners operate as win-maximizers as long as their budget constraints dictate that it is profitable to do so,"⁶⁴ sports economists Evan Totty and Mark Owens analyzed the degree of competitive balance in the NFL (measured by the variation in wins between the best and worst teams each year) based on data from the 1978 to 2010 seasons.⁶⁵ Their research found "no evidence that salary caps improve competitive balance and consistent evidence that revenue sharing does improve competitive balance."⁶⁶ They explain:

This is consistent with economic theory which suggests that talent will move to the location for which it generates the greatest revenue. This movement is independent of the salary cap, but does depend on the nature of revenue sharing in the league. Thus, revenue sharing plans are more

57. *Id.* at 60.

58. *Id.* at 60.

59. *Id.* at 61.

60. *Id.*

61. Helmut M. Dietl, Martin Grossmann, and Markus Lang, *Competitive Balance and Revenue Sharing in Sports Leagues With Utility Maximizing Teams*, 12 J. Sports Economics 284 (2011); Evan S. Totty and Mark F. Owens, *Salary Caps and Competitive Balance in Professional Sports Leagues*, 11 J. For Economic Educators 46 (Fall 2011).

62. Dietl, et. al, *supra* note 48, at 294.

63. *Id.*

64. Totty and Owens, *supra* note 48, at 48.

65. *Id.* at 50. They also analyzed and compared similar data for the NBA and NHL for the same time period.

66. *Id.* at 54.

effective at addressing the primary cause for the disparities in competition across teams, the disparities in revenue generation across teams.⁶⁷

By immunizing the collective sale of NFL teams' television rights from antitrust challenge, the SBA enabled increased revenue sharing among NFL teams, which contributed to a slight initial increase in league-wide competitive balance in the eight-year period immediately following its 1962 implementation. This trend has continued during the past fifty years. An analysis of empirical data comparing NFL teams' respective playoff appearances and league championships from 1953–1961 with 1962–1970 along with an evaluation of the same data from 1962–2012 reflects a positive correlation between the NFL teams' pro rata sharing of television revenues, currently the NFL's single largest form of revenue sharing⁶⁸ and league-wide competitive balance.

As illustrated by Exhibit 1 of the Appendix, from 1953–1961, 75% of NFL teams made the playoffs at least once. By comparison, from 1962–1970, the percentage of NFL teams qualifying for the playoffs increased slightly to 77.27 %. Moreover, it is remarkable that several NFL expansion teams in smaller markets (e.g., Kansas City, Minneapolis, and Oakland) made the playoffs at least once from 1962–1970, while more established teams in larger markets such as the Washington Redskins and Philadelphia Eagles did not make the playoffs during this time. This data shows that the SBA contributed to increased competitive balance among NFL teams soon after its congressional enactment, thereby furthering its primary objective.

More importantly, the SBA also appears to have facilitated competitive balance within the NFL from 1962–2012 based on an analysis of the number of teams qualifying for the playoffs. Exhibit 1 shows that from 1963–1993 (a thirty-year period after the enactment of the SBA, but prior to the 1994 establishment of the NFL's "hard" salary cap), 95% of NFL teams—all of them except the St. Louis, now Arizona, Cardinals—made the playoffs at least once. By comparison, 100% of current NFL teams made the playoffs at least once from 1994–2012 and 1962–2012. Thus, pro rata sharing of television revenue sharing among NFL teams, which began in 1962 and has been occurring continuously since then, seems to be a major impetus for league-wide competitive balance.

As illustrated by Exhibits 2 and 3, the long-term impact of the SBA's incentive for NFL teams to pool and share television revenues to enhance competitive balance is also evident based on the relative percentages of playoff participation by NFL teams. From 1962–2012, only four teams, the Dallas Cowboys (60%), Minnesota Vikings (54%), Pittsburgh Steelers (52%), and Baltimore Ravens (formerly the Cleveland Browns) (50%) have participated in the NFL playoffs 50% or more of the time. Although the Cowboys made the playoffs thirty times, the team failed to do so twenty times (40%) since 1962. Since 1962 twenty different NFL teams, including several small and mid-market teams—the Buffalo Bills, Green Bay Packers, Indianapolis (formerly Baltimore) Colts, Jacksonville Jaguars, Kansas City Chiefs, Miami Dolphins, Minnesota Vikings, Pittsburgh Steelers, San Diego Chargers, and Seattle Seahawks—have appeared in the playoffs at least 30% of the time since they joined the NFL. Since 1962 or the time it joined the league, each NFL team, except the current Cleveland Browns, an expansion team in existence since 1999, has made the playoffs at least 11.3% of the time. Notably, small market teams such as the Pittsburgh Steelers (49.1%) and the Green Bay Packers (43.4%) made the playoffs more frequently than large market teams such as the New York Giants (34%), Chicago Bears (28.3%), and New York Jets (26.4%).

Exhibit 4 shows that the Indianapolis Colts and the Green Bay Packers each made the playoffs twelve times from 1990–2009, which exceeded the total number of playoff appearances by teams in large markets such as the New England Patriots (11), New York Giants (9), New York Jets (7), and Chicago Bears (6).

67. *Id.*

68. It is estimated that the aggregate value of the NFL's television contracts for the 2012 season was approximately \$4.1 billion. THE U.S. PROFESSIONAL SPORTS MARKET & FRANCHISE VALUE REPORT 2012, WR HAMBRECHT + CO., available at http://www.wrhambrecht.com/pdf/SportsMarketReport_2012.pdf. [Note to ONU Law Review editors-you can find this publication online by typing in its name, but I'm not sure how to cite it.] – AUTHOR: How readily available is this source in print? The format I used is for sources where the internet just improves access to something otherwise available in print. I'm not sure because I only found it online.

With twelve appearances, the Pittsburgh Steelers made the playoffs as many times as the Philadelphia Eagles, whose metropolitan area is much larger. From 2000–2009, the Indianapolis Colts made nine appearances, which equaled the combined number of times that the Dallas Cowboys, Chicago Bears, and Washington Redskins made the playoffs in the same time period. In the 1990s, the Buffalo Bills’s eight playoff appearances equaled the combined total of the Chicago Bears (3), New York Giants (3), and New York Jets (7). It is interesting to note that not only has there been a significant degree of overall competitive balance in the NFL since the SBA was enacted, but also that relatively few NFL teams have maintained their dominance by consistently qualifying for the playoffs during the 1990s and 2000s. Exhibit 4 shows that some of the most successful teams from the 1990s in terms of playoff appearances, e.g., the Buffalo Bills, Dallas Cowboys, San Francisco 49ers, and Detroit Lions, did not experience similar success in the next decade; whereas, the reverse was true for teams like the Baltimore Ravens (former Cleveland Browns) and Seattle Seahawks, which had considerably more playoff appearances in the 2000s compared to the 1990s. Only two teams, the small-market Pittsburgh Steelers and Green Bay Packers, qualified for the NFL playoffs 60% of the time during both decades.

Exhibit 5 illustrates that eighteen of the current thirty-two NFL teams (56%) have won the Super Bowl since its inception in 1967, six years after the enactment of the SBA. A small-market team, the Pittsburgh Steelers, has won the most Super Bowls with six victories. Despite being in the NFL’s smallest market, the Green Bay Packers’ four wins ties the New York Giants for the fourth most Super Bowl championships. By comparison, the New York Jets and Chicago Bears, which are located in the league’s two largest markets respectively, have each won only one Super Bowl.

In summary, the foregoing analysis demonstrates that the existence of a significant degree of competitive balance in the NFL from 1962–2012, including from 1963–1993, before the “hard” salary cap was implemented, as measured by playoff participation and the distribution of Super Bowl championships, which is positively correlated with its teams’ initial pooling and pro rata sharing of television revenues immediately after enactment of the SBA. This statute’s antitrust exemption was the catalyst for collective licensing and sale of league teams’ intellectual property rights, which has enabled teams in small television markets to be financially viable and have competitive success on the playing field. As the value of NFL teams’ television rights have skyrocketed, pro rata revenue sharing among league teams has become an even more important means of achieving these objectives and enables the NFL to produce a very popular product attractive to consumers, although non-exempted collective sales of television rights to cable networks such as ESPN and satellite distributors such as DirecTV constitute multi-billion dollar components of the overall value of NFL television contracts.⁶⁹

IV. NCAA V. BOARD OF REGENTS AND ITS EFFECTS ON DIVISION 1 FBS COMPETITIVE BALANCE

In a 1984 case, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*,⁷⁰ the Supreme Court of the United States ruled that the NCAA’s collective, exclusive sale of its member universities’ football television rights violated §1 of the Sherman Act.⁷¹ The NCAA’s television plan, which was initiated in 1952 and prohibited its Division I member universities from individually selling football television rights except in accordance with its requirements, was intended to reduce the adverse effects of televised college football on attendance at college football games, particularly those between less successful or popular teams, and to maintain competitive balance among university football programs.⁷²

69. The NFL Signs TV Deals Worth \$27 Billion, *Forbes*, available at <http://www.forbes.com/sites/kurtbadenhausen/2011/12/14/the-nfl-signs-tv-deals-worth-26-billion/> (December 14, 2011). Beginning in 2014, it is estimated that each NFL team will receive an annual pro rata share of more than \$200 million from the sale of media rights, primarily television broadcasting rights.

70. 468 U.S. 85 (1984).

71. *Id.* at 120.

72. More specifically, its primary objectives were to:

The plaintiffs, the University of Oklahoma and the University of Georgia, were members of the NCAA and the College Football Association (CFA), a group of five major athletic conferences and some independent universities with major football programs (e.g., Notre Dame) that entered into a contract with NBC to televise their games. These universities sought to invalidate the restrictive requirements of the NCAA's college football television plan and to enjoin the NCAA from taking threatened disciplinary action against any CFA member that complied with the NBC television contract.⁷³

In separate contracts with ABC and CBS, the NCAA granted each network the right to televise fourteen regular season college football games annually during a four-year period for a total payment of \$131,750,000. These contracts authorized each network to negotiate directly with NCAA universities to televise their games for a fixed rights fee for different types of telecasts (e.g., national or regional broadcasts), which was established by the NCAA and did not vary based on the size of the viewing audience or the identity of the participating teams. The NCAA television plan also contained "appearance requirements" and "appearance limitations" applicable to each of the two-year periods it was in effect. During this period, each network was required to televise the games of at least eighty-two different NCAA universities, and no university's football games could be televised more than a total of six times and more than four times nationally. For example, the games of historically strong and popular teams such as Notre Dame and Ohio State could be televised nationally a maximum of six times over two years, and numerous less attractive games involving other college football games were required to be televised.

Concluding that "the NCAA's television plan has a significant potential for anticompetitive effects" because it restricts the output of televised college football games and fixes their price, the Court observed:

In this connection, it is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. See 15 U.S.C. §§ 1291–1295. The legislative history of this exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act . . .⁷⁴

Applying the rule of reason, the Court determined that the NCAA's television plan restrained trade by preventing economic competition among its member universities for the sale of their football television broadcasting rights and imposed upon the NCAA "a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market."⁷⁵ The Court rejected the NCAA's assertion that its television plan is a pro-competitive joint venture that promotes the sale of college football television rights because their output "has been limited, not enhanced" and "[n]o individual school is free to televise its own games without restraint."⁷⁶ Implicitly rejecting *NFL I*, the Court ruled that the NCAA's objective of preventing televised college football from reducing live attendance at games is not a valid pro-competitive justification for limiting the number of televised games.⁷⁷ Although the Court agreed that "maintaining competitive balance among amateur athletic teams is legitimate and

[1.] To reduce, insofar as possible, the adverse effects of live television . . . upon football game attendance and, in turn, upon the athletic and education programs dependent upon the proceeds therefrom; [2.] to spread television participation among as many colleges as practicable; . . . and [3.] to provide college football television to the public to the extent compatible with these other objectives.

Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. at 91 [hereinafter *NCAA*] (quoting Brief of Pet. App. 35, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).

73. *Id.* at 93-95.

74. *Id.* at 106, n.28.

75. *Id.* at 113.

76. *NCAA*, 468 U.S. at 114-115.

77. On the other hand, the Court suggests that if the NCAA had proven this restriction was necessary to "maintain the integrity of college football as a distinct and separate product," it would have been a valid defense—a result consistent with *NFL I*'s rationale for allowing the NFL to prohibit the televising of out of market games when an NFL team was playing at home. *Id.* at 116. However, the NCAA's television plan did not prohibit college football games from being televised while live games were being played, and the NCAA did not prove that televising games actually reduced live game attendance.

important,”⁷⁸ it found that the NCAA’s restraints on the televising of college football games “does not equalize competition within any one league”⁷⁹ and did not have “any intent to equalize the strength of teams in Division I-A with those in Division II or Division III.”⁸⁰ The Court noted that the NCAA had not implemented a similarly restrictive television plan to maintain competitive balance in Division 1 intercollegiate basketball. Consistent with *NFL II*, the Court ruled that the NCAA’s collective, exclusive television plan to be an unreasonable restraint of trade that violates §1 of the Sherman Act.⁸¹

Although the Court enjoined the NCAA from collectively selling its members’ college football television rights, it did not broadly rule that antitrust law prohibits any joint selling of college football television rights. After *Board of Regents*, Division 1 FBS (formerly known as Division 1A or Bowl Championship Series), college football television rights⁸² generally have been collectively sold by regional athletic conferences of approximately 8-16 member universities to network television, e.g., ABC, CBS, NBC, or Fox, or cable television broadcasters (e.g., ESPN) although some universities such as Notre Dame sell these rights individually.

In *Association of Independent Television Stations, Inc. v. College Football Association*,⁸³ a federal district court rejected a television broadcaster’s contention that a series of contracts conveying exclusive rights to televise Big Eight Conference football games to other broadcasters is *per se* illegal because it limited the number of available games that the plaintiff could televise.⁸⁴ The court stated: “In the marketing of television rights, just as in the management of the live contest itself, some cooperation is necessary if the product, live college football television, is to be available at all.”⁸⁵ Recognizing that joint sales of television rights may have potential pro-competitive efficiencies, the court found that the conference television package creates a new product, namely a “national series of games,” that creates more effective competition in the live college football television market that may survive rule of reason scrutiny.⁸⁶

Unlike the NFL’s long history of equal sharing of television revenues among its teams, facilitated by the SBA, there is no pro rata sharing of collectively sold football television rights among FBS universities except within individual athletic conferences. A comparison of the AP Top 25 final college football season rankings and national championships from 1985 through 2012 with NFL teams’ playoff appearances and Super Bowl championships during the same period shows there is significantly less competitive balance among FBS universities than among NFL teams. This comparative lack of competitive balance exists despite the existence of their analogous devices to maintain competitive balance among their respective teams. The NFL limits the size of its teams’ player rosters and has a “hard” cap on each team’s annual aggregate player salaries. The NCAA limits the number of FBS athletic scholarships that a university may award to football players and imposes an effective cap on the maximum amount of player compensation—the economic value of an athletic scholarship is limited to the costs of room, board, tuition and books, which necessarily varies among FBS universities. Although this is not an “apples to apples” comparison, it provides further support that the SBA historically has played a significant role in maintaining competitive balance in the NFL by permitting the league to collectively sell its teams’ television rights to free “over-the-air” broadcasters.

Exhibit 6 illustrates that 100% of the NFL’s teams qualified for the playoffs from 1985–2012; whereas, only 69% of FBS teams finished in the final AP Top 25 Poll during the same period. While each NFL team at least periodically earned a spot in the NFL playoffs, nearly one-third of all FBS teams failed to be ranked

78. *Id.* at 117. In *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201, 2217 (2010), the Supreme Court recognized that maintaining competitive balance among professional league teams also is “legitimate and important.”

79. *Id.* at 117–118.

80. *Id.* at 118.

81. *Id.* at 120.

82. The NCAA produces and sponsors Division 1 FCS, II, and III football championship playoffs and sells the television rights to these games, which does not reduce economic competition among its member universities in the college football television market or otherwise unreasonably restrain trade in violation of §1 of the Sherman Act.

83. 637 F. Supp. 1289 (W.D. Okla. 1984).

84. *Id.* at 1308–09.

85. *Id.* at 1297.

86. *Id.* at 1298.

in the final AP Top 25 Poll even once—a stark difference in the relative degree of competitive balance within the NFL as compared to FBS football. Moreover, Exhibit 7 shows that almost 50% of FBS teams have been ranked two times or less in the final AP Top 25 Poll from 1985–2012. On the other hand, the FBS teams that have been ranked the most times are all traditional football powers from BCS conferences: Florida State (24), Michigan (24), Nebraska (23), Miami, Florida (21), Florida (20), and Ohio State (20). The only football teams from non-BCS conferences to be ranked more than five times in the final AP Poll since 1985 are Brigham Young (“BYU”) (11) and Boise State (9). This concentrated distribution of final AP Top 25 Poll rankings in favor of traditionally strong teams from BCS conferences shows a correlation between FBS competitive imbalance and the NCAA’s post-*Board of Regents* inability to collectively sell its member universities’ television rights and to distribute the revenues more equally among all FBS teams.

The significant difference in competitive balance within the NFL in comparison to FBS football is further illustrated by Exhibit 8. In the 1990s, every NFL team qualified for the playoffs at least once, while only slightly more than 50% of FBS football teams were ranked even once in the final AP Top 25 Poll. Similarly, from 2000–2009, approximately 90% of NFL teams qualified for the playoffs, compared to only 53% of FBS teams who achieved a top twenty-five ranking. This exhibit shows that this relative disparity has continued from 2010–2012.

In addition, a comparison of the distribution of championships between NFL and FBS teams evidences a stark disparity in competitive balance. Exhibit 9 shows that 40% of current NFL teams have won at least one Super Bowl since 1985. Approximately 22% of the NFL teams that have won a Super Bowl are in small markets; the Pittsburgh Steelers, Green Bay Packers, Denver Broncos, and Baltimore Ravens have each won two Super Bowls.

In contrast, Exhibit 10 illustrates that only 13% of the current FBS teams—17 out of 127—have won an AP national championship at least once since 1985. The only FBS team from a non-BCS conference to win a title since 1985 is BYU. All of the other sixteen AP national champions have been traditional football powers from major BCS conferences. Three teams—Miami, Alabama, and Florida—collectively have won eleven AP national championships since 1985. In other words, 2% of the FBS teams have won 40% of the AP national titles from 1985–2012, which evidences a substantial degree of competitive imbalance, a stark contrast to the NFL’s relative league-wide parity.

In summary, the foregoing analysis provides further support that the SBA has contributed to competitive balance within the NFL. The NFL’s collective sale of its teams’ television rights and pro rata revenue sharing correlates with a significant degree of historical competitive balance in the NFL. Conversely, the NCAA’s inability to collectively sell its member universities’ football television rights and distribute the revenues on an equal basis correlates to a corresponding lack of competitive balance among FBS football teams.

V. CONCLUSION

By providing limited antitrust immunity, the SBA facilitated the centralized sale of television rights by professional sports leagues during a critical period in which network television rights fees were increasing significantly and resulting revenue disparities threatened league-wide competitive balance if teams individually sold these rights and retained the revenues.⁸⁷ This federal statute enabled professional sports league teams to share national television broadcasting revenues pro rata, an important and longstanding form of revenue sharing designed to achieve and preserve competitive balance, which is essential to a professional sports league’s long term financial viability and survival as an attractive form of entertainment for consumers.⁸⁸ The foregoing empirical analysis shows a positive correlation between NFL teams’ pro rata sharing of collectively-sold television rights and competitive balance within the NFL, a result that Congress intended the SBA to achieve.⁸⁹ Our comparative analysis also demonstrates a relative lack of

87. See *supra* Parts II-III.

88. See 15 U.S.C. 1291.

89. See *supra* Parts III-IV.

competitive balance among Division I FBS teams, which under current law cannot be remedied by the collective sale of all Division I FBS universities' football television rights and pro rata distribution of the revenues because the SBA provides no antitrust immunity for NCAA universities.

APPENDIX

Exhibit 1

Percentage of NFL Teams Making the Playoffs

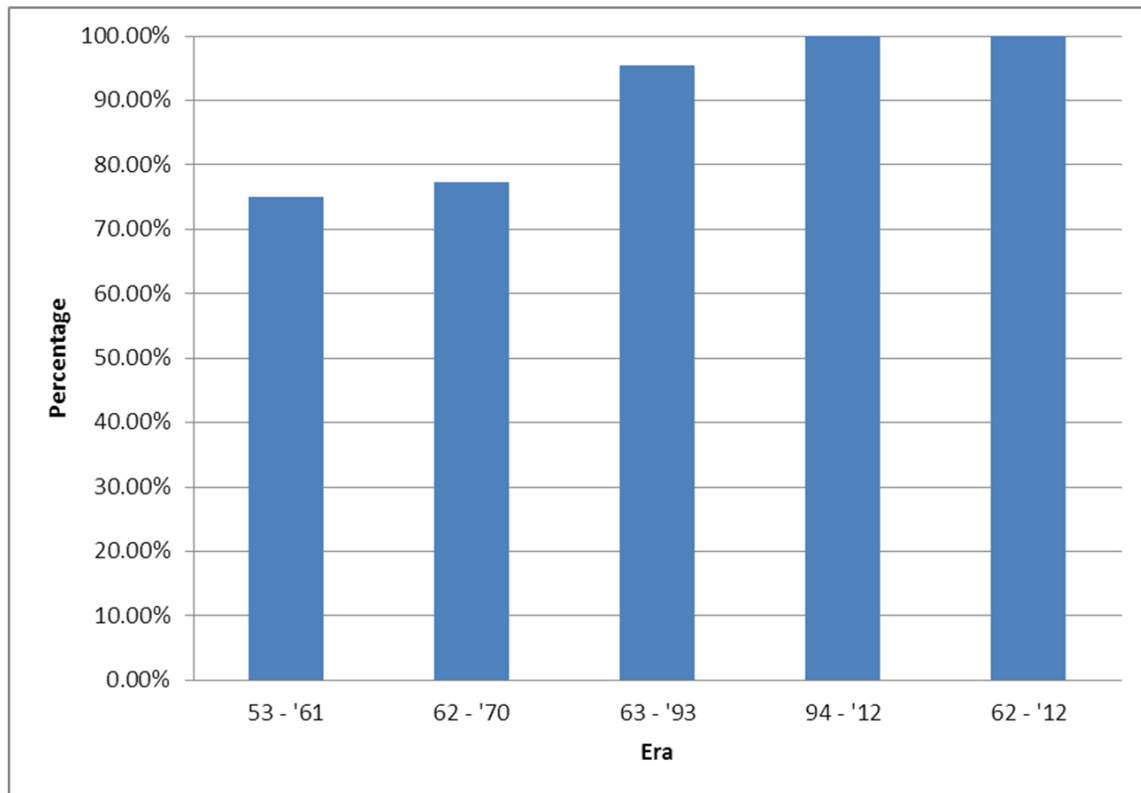


Exhibit 2

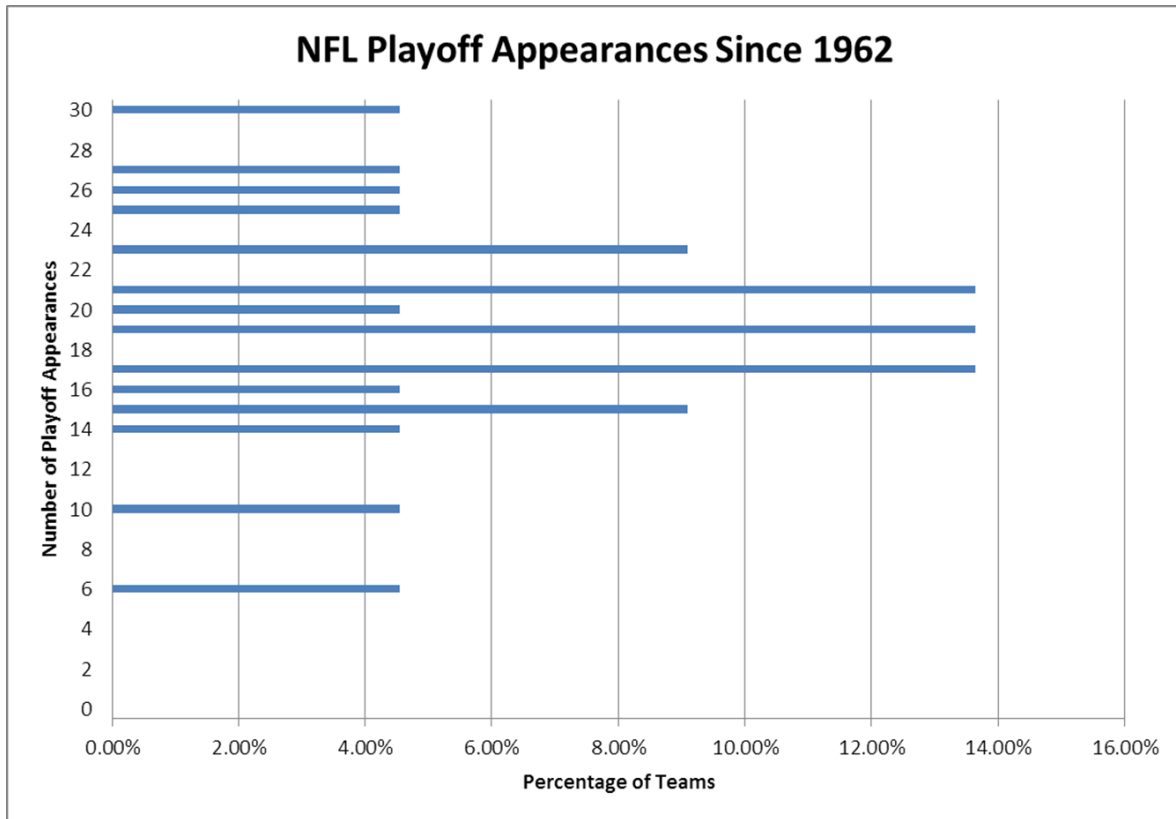


Exhibit 3

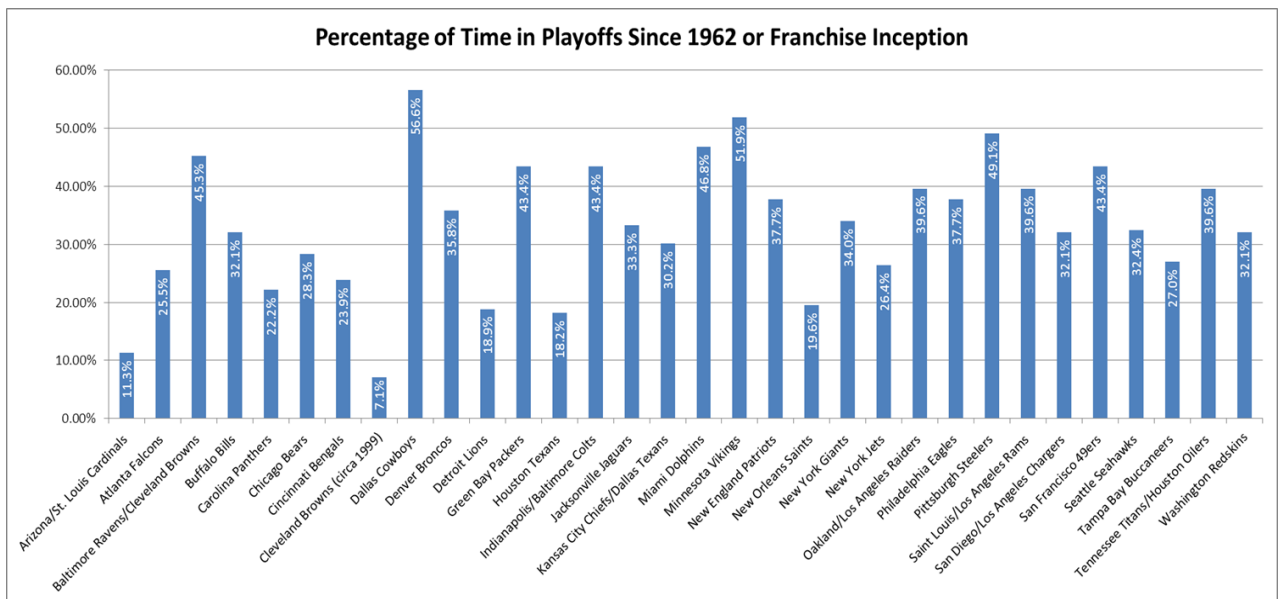


Exhibit 4

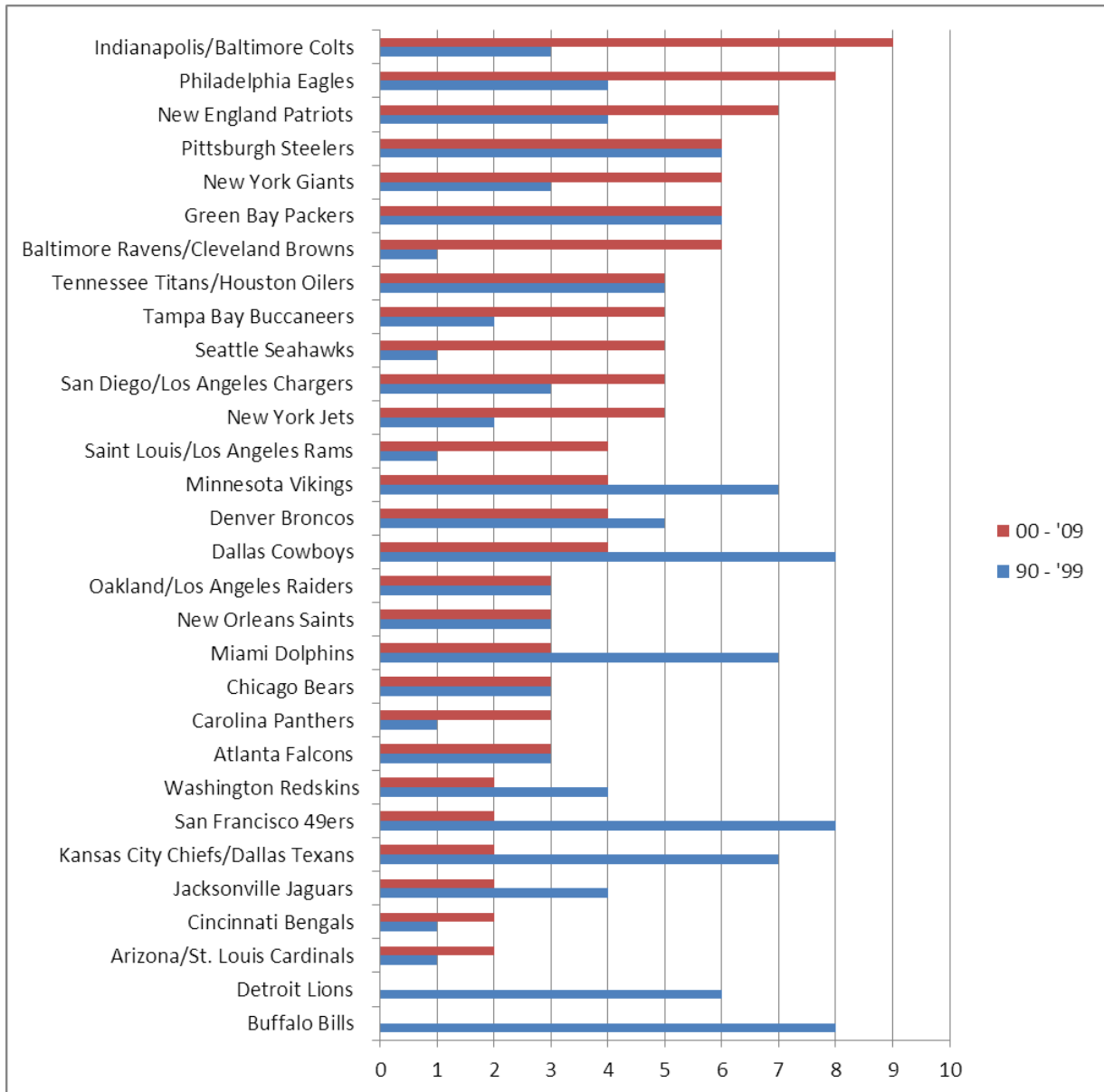


Exhibit 5

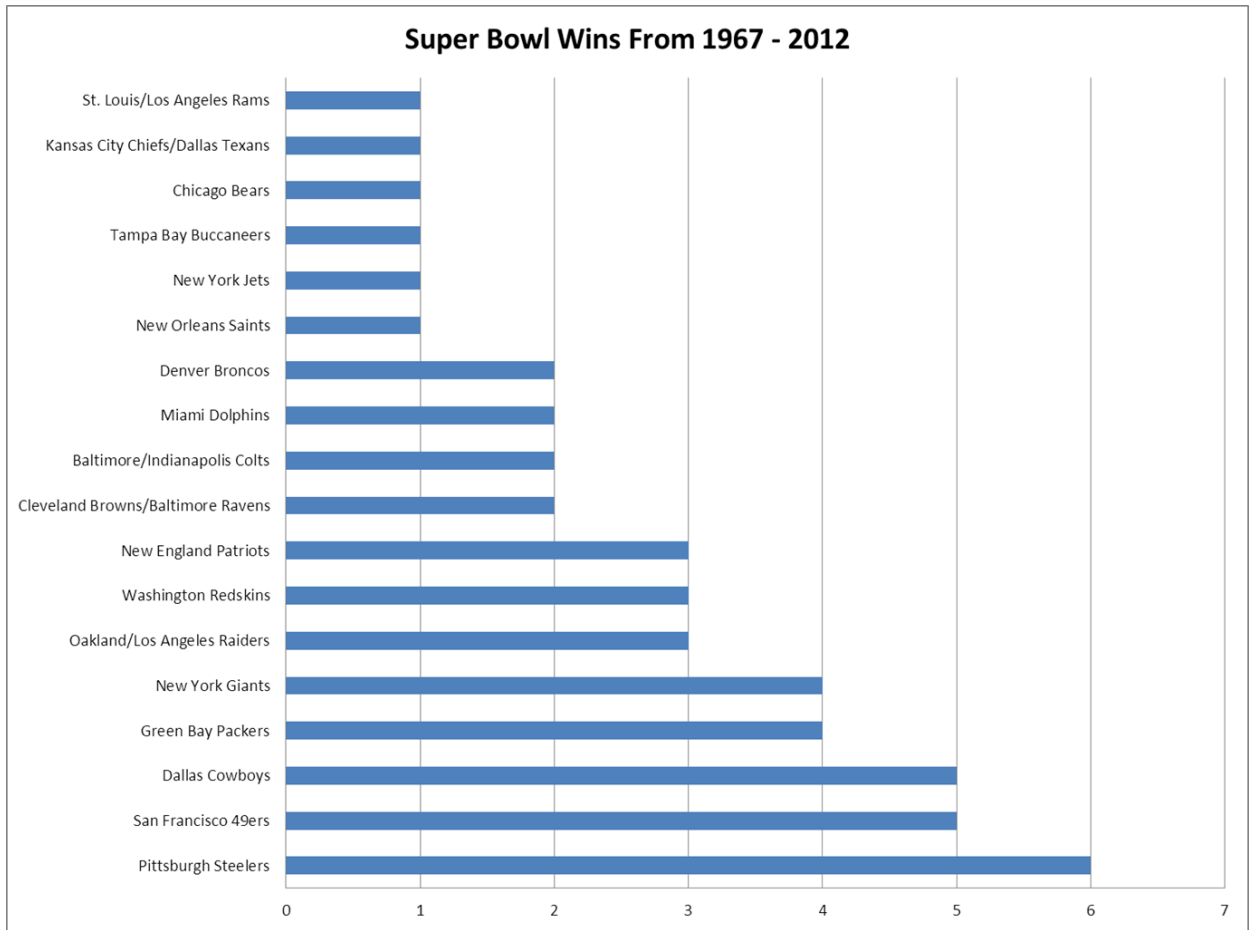


Exhibit 6

**Division 1 FBS Teams in AP Top 25 v. NFL Teams in Playoffs
1985 - 2012**

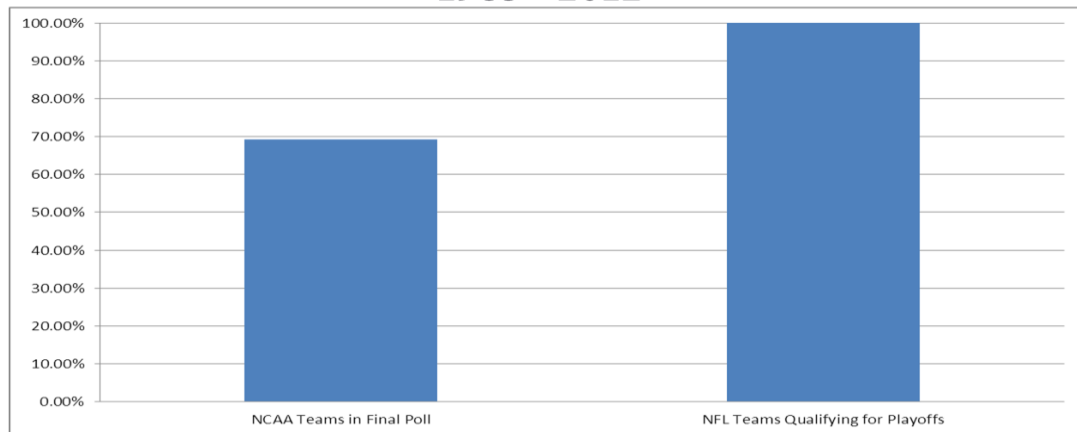


Exhibit 7

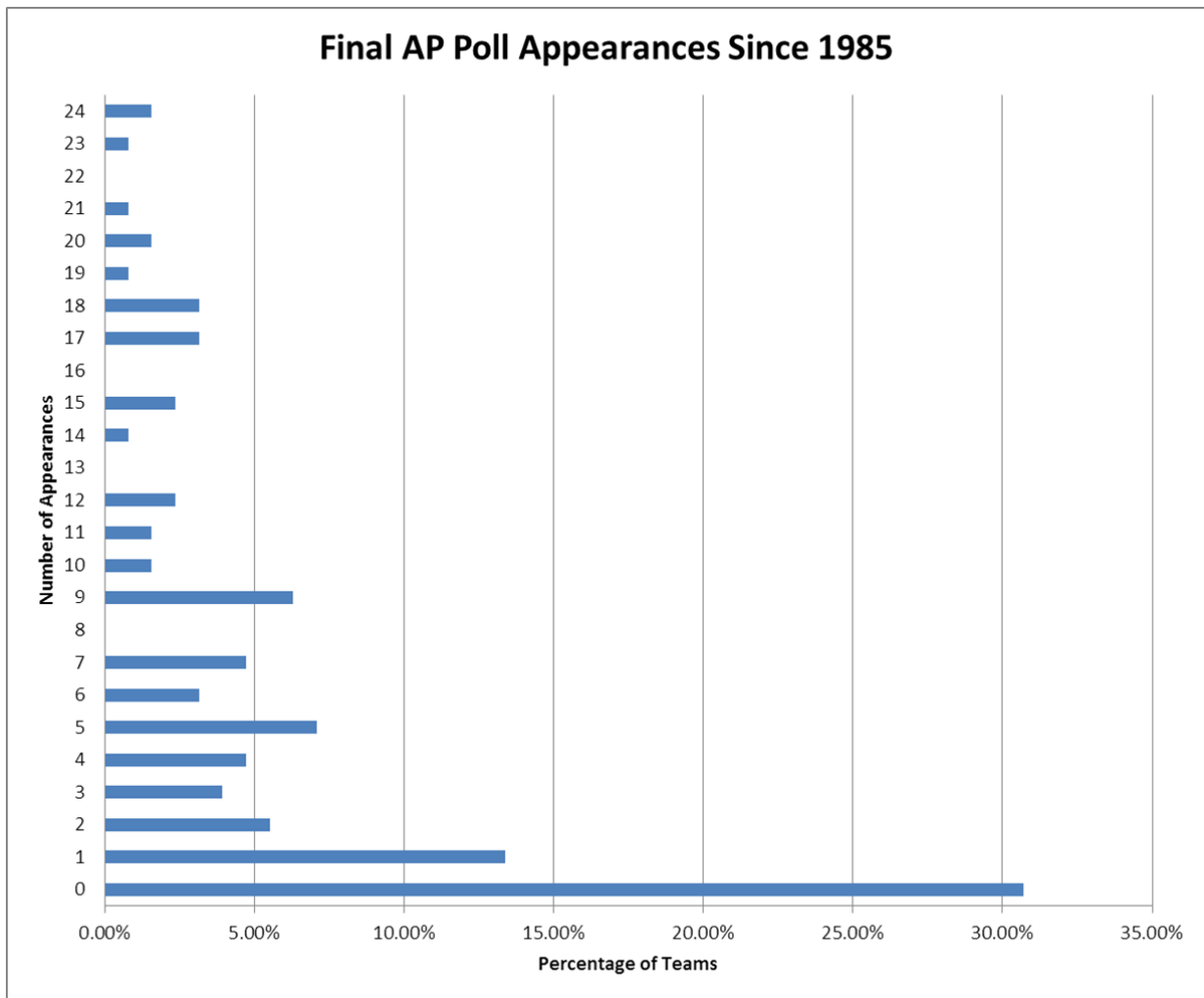


Exhibit 8

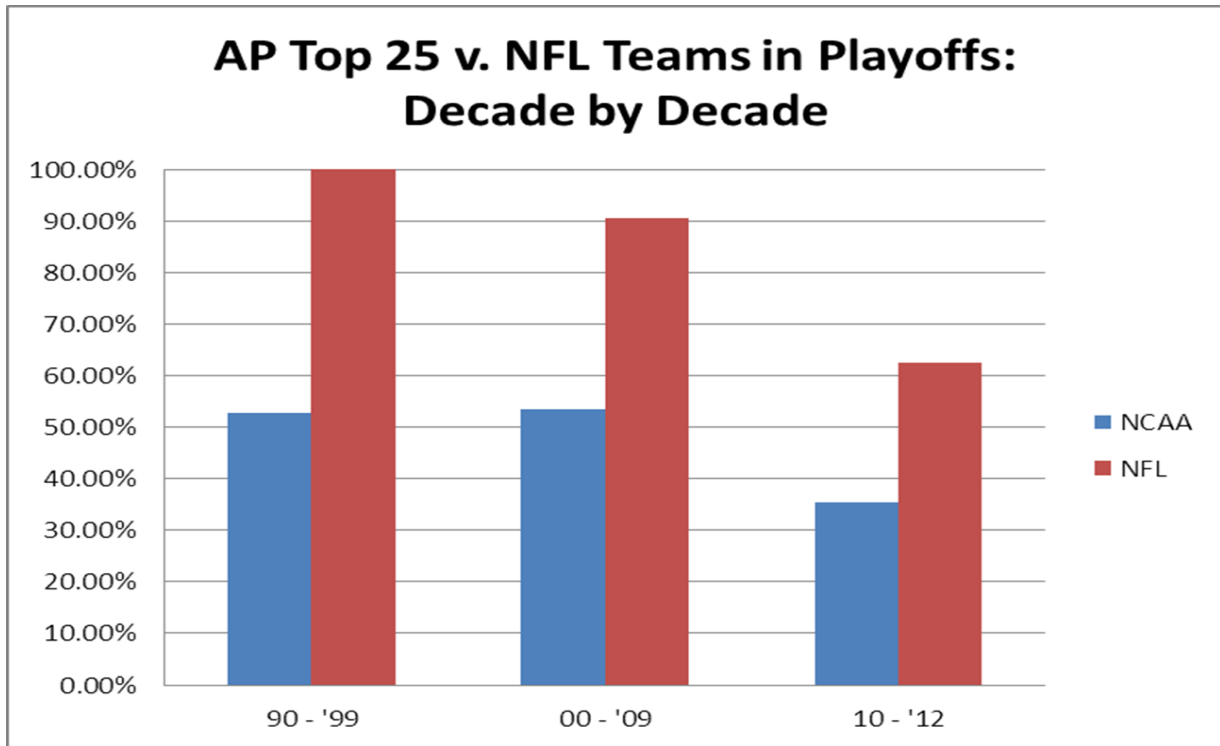


Exhibit 9

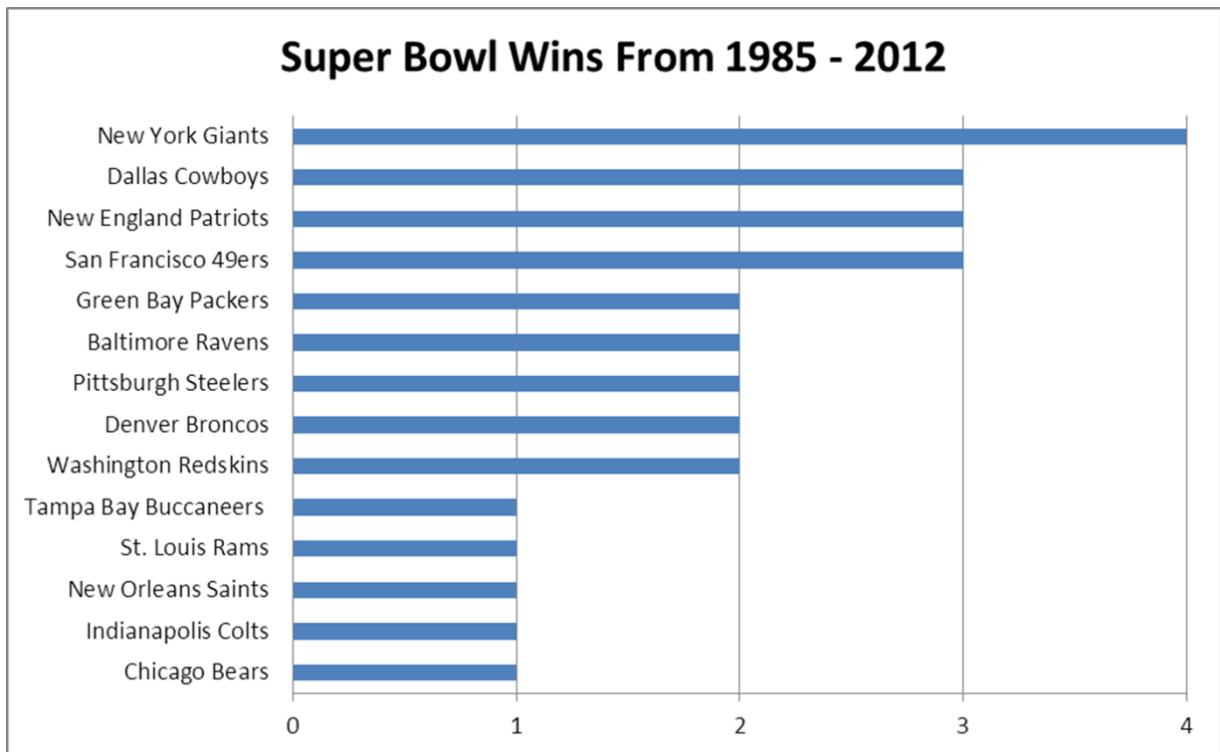


Exhibit 10

