The Marriage Tax Penalty and *Johnson v. United States*:

Time for a New Challenge

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Abstract. The marriage tax penalty has been penalizing dual-earner married couples for more than 100 years. This discriminatory practice has been permitted to endure, with the case of *Johnson v. United States* often cited as "the case" in which the court ruled that the marriage tax penalty does not violate the constitution. We propose that the *Johnson* decision is flawed and would not withstand a new challenge. The *Johnson* decision was based on the premise that the tax code supported a compelling government interest, the single-earner household, and that the penalty was not cost prohibitive. Society has evolved, with more women working out of the home and contributing a greater percentage to household income, and the marriage tax penalty has increased, rising to the level of a prohibition for many low-to-middle income households. We examine the marriage tax penalty and the *Johnson* decision, and propose that with strict scrutiny that the marriage tax penalty should be ruled unconstitutional.

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I. Introduction

One group has been successfully penalized under the U.S. Internal Revenue Code for more than a century, *dual-earner married couples* and, more specifically, *married working mothers*. The Internal Revenue Code discriminates, both by taxing dual-earner married parents more than dual-earner unmarried parents, and by taxing single-earner married couples less than all other couples. Through arguably their most powerful branch, the Internal Revenue Service, the federal government has effectively *taken sides* in society against dual-earner couples. By providing a dual-earner marriage tax penalty, the tax code attempts to encourage the traditional nuclear family, i.e., a single-working parent and a stay-at-home parent, traditionally the mother. However, in practice, the tax code simply encourages all working couples, including working mothers, to not marry.

This long-standing penalty has remained in place because the legislature has failed to provide a more equitable tax system. While a series of empirical studies have attempted to investigate the influence of the marriage tax penalty on marriage decisions and provided limited evidence of its influence, recent evidence provides robust evidence that the marriage tax penalty deters couples from marriage (Cheng, Crumbley, Enis, and Yurko, 2018).[1] Therefore, this study reexamines the marriage tax penalty and the constitutionality of preserving its disproportionate influence.

[1] For a more detailed discussion of prior empirical studies, we refer readers to the Cheng et al. (2018) article.

Johnson v. United States[2] is the first case to challenge the marriage tax penalty (Barry, 2015), and commonly cited as the case affirming the validity of a tax system that provides a marriage tax penalty. However, we propose that the *Johnson* decision is questionable and that it is likely to be overturned with a fair, non-biased application of the U.S. Constitution. The *Johnson* ruling stems from a time when married women were generally expected to leave the work force. Since the 1970s, more married women are working outside of the home and the definition of a typical American family has evolved.[3] The weakly concealed bias against working women contained within the *Johnson* ruling would likely not survive today's closer scrutiny.

This study proposes the elimination of the dual-earner marriage tax penalty because it violates the U.S. Constitution. First, the penalty should be disallowed because it burdens couples' fundamental right to marriage and there is no compelling government interest that justifies this burden. Second, while the plaintiffs in the Johnson case were unaffected by the tax itself, the disproportionate influence of the penalty likely affects the decisions of many low-to-middle income couples, rising to the level of a prohibition that violates couples' fundamental right to marry. Marriage should not be a luxury only available to the wealthy. By penalizing couples based on their marital status, the tax code violates couples' right to due process and equal protection under the law. Further, because the penalty may compel couples, and more specifically parents of dependent children to not marry, the penalty fights against society's goal of supporting married families (Covert, 2014).

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[2] 422 F. Supp. 958 (N.D. Ind. 1976*) aff'd sub nom*. Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 98 S. Ct. 725 (1978). For brevity, we will sometimes refer to the case of *Johnson v. United States* as the *Johnson* case.

[3] The Bureau of Labor Statistics on http://www.bls.gov/opub/ted/2014/ted_20140602.htm

Section II presents the history of the marriage tax penalty. Section III examines the Johnson decision. We conclude in Section IV.

II. History of the Marriage Tax Penalty

In 1913, the 16th Amendment to the U.S. Constitution established the federal income tax and the *Revenue Act of 1913* created the first Dual-Earner Marriage Tax Penalty and Single-Earner Marriage Tax Subsidy. A dual-earner unmarried couple excluded $6,000 of income from taxation ($3,000 per person), compared to only $4,000 for a married couple. In contrast, for a single-earner household, an unmarried worker could exclude only $3,000 of income from taxation, compared to the $4,000 to his/her married counterpart could exclude. In a sociological environment where co-habitation was discouraged and single-earner households were the norm, this simple beginning set the foundation for the construct that guides the U.S. tax code, the tax burden is imposed in the following order: the least on single earner married couples, with a greater burden on unmarried individuals, with the greatest burden on dual-earner married couples.

Because the federal tax system provided a progressive rate structure, i.e., the marginal tax rate increases with income, higher income tax payers attempted to shift their income to their lower income partners. In common law states, taxpayers attempted this shift contractually. However in the famous "fruit-tree" case of *Lucas v. Earl*,[4] the Supreme Court of the U.S. (SCOTUS) declared this practice ineffective, declaring that the income must be linked to the earner. However later that same year, SCOTUS found in *Poe v. Seaborn*[5] that state community property laws are effective at shifting income between spouses. This split created a fundamental

[4] 281 U.S. 111 (1930).
[5] 282 U.S. 101 (1930)

inequity between the federal income tax treatment of couples in common law states versus those in community property states. Faced with this costly inequity, some additional state legislatures adopted a community property system for their residents (Puckett 2010). However, while married couples in community property states benefitted from the income splitting, the community property regulations may also result in a less favorable property settlement for the *breadwinner* (typically the husband), relative common law states.[6]

Perhaps as a direct consequence of the latter effect, Congress addressed and eliminated the community property v. common law inequity in 1948. The *Revenue Act of 1948* fundamentally changed the federal income tax system by creating the *Married Filing Joint* tax status and defining the family as the unit for taxation, instead of the individual (Gerzog, 1978). While this change lessened the marriage tax penalty (Wiggins, Crumbley, and Apostolou, 1986), it seriously burdened unmarried individuals, whose tax liability could be up to 41% greater than their married counterparts.[7] Although unmarried parenthood was generally socially unacceptable at this time, there were an estimated 5 million war-widows raising their children alone.[8]

Responding to pressure to protect these families, Congress created the *Head of Household* status in 1951.[9] Further, Congress passed the *Tax Reform Act of 1969* that

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[6] In a community property state, the property acquired during marriage is classified as *community property* and, consequently, should be divided equally in divorce. For common law states, the marital property is subject to an "equitable" division, which is not necessarily equal. Because intellectual property is subject to the community property regulations, celebrity divorce attorneys may spend years battling over intellectual property rights. For example, the divorce of Michael Douglas from his first wife dragged on for decades as attorneys battled over which future earnings from intellectual property are subject to division. For an interesting discussion, see https://www.forbes.com/sites/jefflanders/2011/05/03/the-big-thing-celebrities-fight-most-about-when-they-divorce-and-why-you-should-too/#19bea0eb17e7.

[7] S. Rep. No 552, 91st Cong., 1st Sess. 260 (1969), *reprinted in* Internal Revenue Acts: Text and Legislative History 1966-1970, at 1909 (1971).

[8] https://www.u-s-history.com/pages/h1692.html

[9] I.R.C. §2(b)

established a progressive tax rate structure based on taxpayers' filing status, e.g., *Single, Married Filing Jointly, Head of Household*.[10] The new tax schedules reduced the tax burden imposed on single-filers, who would never pay more than 120% of the income tax paid by a married couple with the same total level of income (Alm and Leguizamon, 2015). However, the progressive rate system created the tax rate component of the dual-earner marriage tax penalty, costly to all two earner married couples in which each spouse contributes at least 20% to the couple's total earned income (Gerzog, 1978).

Over the years, the legislature has attempted to address this inequity. For example, the *Economic Recovery Tax Act of 1981* reduced the DMTP by creating the *Deduction for a Married Couple When Both Work*, calculated on the new Schedule W,[11] but was quickly repealed in the *1986 Tax Reform Act*. *The Omnibus Budget Reconciliation Act of 1993* expanded the number of tax brackets and expanded the Earned Income Tax Credit, which likely expanded the DMTP for low-income families (Feenberg and Rosen, 1995). The *American Taxpayer Relief Act of 2012,* which provides that the *Married Filing Joint* (MFJ) standard deduction is permanently set at twice that provided *Single* taxpayers and expanded the 15% tax bracket for the MFJ. However, both the 2012 act and the 2017 *Tax Cut and Jobs Act* preserved the *Head of Household* status, a great source of the DMTP, and increased the marriage penalty through other provisions. These include different personal exemption phase-outs for singles versus married couples, a new higher top tax bracket, and a new surtax related to healthcare in the 2012 act; and limited state and local

[10] I.R.C. §1(a-d) provide the tax rate schedule for each filing status.
[11] During a question-and-answer session on February 16, 1977, Jimmy Carter stated "… I don't want to publicize it, and I hope you don't tell anybody about it, but two people who do live together who are not married have an advantage when they pay their income tax."

tax deductions, mortgage interest deductions, and student loan interest deductions in the 2017 act.

The federal tax system has penalized dual-earner married couples for more than 100 years, and continues to do so through 2018. The penalty increases as the partners' income contributions equalize and if the couple supports minor children (U.S. Treasury 2016). Over these 100 plus years, the dynamics of the American family have changed. When Congress created the *Married Filing Joint* status in 1948 in the midst of the post-war baby boom, about 20% of wives worked outside of the home[12]. By 1980, more than 50% of wives worked outside of the home[13] and one-worker couples represented only 24.5% of all tax returns filed (Gann, 1983). Further, for working married women, their mean percentage contribution to total household income has exceeded 25% since 1970 and has progressively increased over the following decades.[14] As a consequence, more than half of married U.S. households may have been paying some level of the marriage tax penalty for several decades.[15]

III. Proposal for Equal Treatment Under the Law and The End of a Century of Discrimination: Time to Revisit *Johnson v. United States*

The fundamental consequence of the tax code is that a married couple will have a different federal income tax liability than a similarly situated unmarried couple, based solely on their marital status. Consequently, the Internal Revenue Code has been challenged on Constitutional grounds. Three early claims were consolidated and addressed together in a single

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[12] The Bureau of Labor Statistics on http://www.bls.gov/opub/ted/2014/ted_20140602.htm
[13] *Id.*
[14] *Id.*
[15] For example, in 1979, a two-earner married couple who contributed equally to their total household income of $30,000 ($40,000) would pay $903 ($1,692) more in federal income taxes than if they had remained unmarried. This represents an additional 3% (4%) of federal income tax (Gann, 1983) for the luxury of marriage.

decision, generally identified by the plaintiff Sarah G. Johnson, *Johnson v. United States*.[16] The ruling denied the plaintiffs' claims for relief and upheld the constitutionality of the marriage tax penalty. Because the Supreme Court refused to accept the plaintiffs' appeals, SCOTUS fundamentally affirmed the lower court's decision and tacitly ruled that the marriage tax penalty did not violate the U.S. Constitution.

We propose that it is time for the court to revisit this issue. The ruling in *Johnson* relies heavily on two highly questionable assertions. First, the court determined that the marriage tax penalty is acceptable because it is "obvious" that the government has a compelling interest that satisfies the requirements of *Shapiro v. Thompson*.[17] In making this assertion, the court relied on the criticized[18] ruling in *San Antonio Independent School District v. Rodriquez.*[19] Second, the court seems less persuaded by any legal argument, and more persuaded by their belief that dual-working couples can afford the penalty, repeatedly emphasizing with quotes that the marriage penalty affects only those couples "*when each spouse has "significant" income*." However, recent empirical evidence clearly indicates that the marriage tax penalty affects couples' marriage decisions and it is the low-to-middle income households that are most affected by the penalty (Cheng et al., 2018).

We next present the facts of the case for three couples considered in the *Johnson* ruling, why we feel that marriage tax penalty violates the taxpayers' right to due process, and how the

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[16] 422 F. Supp. 958 (N.D. Ind. 1976*) aff'd sub nom*. Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 98 S. Ct. 725 (1978).

[17] 394 U.S. 618 (1969)

[18] We refer readers to the discussion in: http://time.com/4056051/worst-supreme-court-decisions/

[19] 411 U.S. 1 (1973)

current state of marriage tax penalty effectively prohibits marriage for many low-to-middle income households.

Sarah Johnson, The Barters, and The Blairs

At the start of 1971, Sarah Johnson was a widow with three minor children by her deceased husband. Throughout the year, she worked and bore the costs of supporting her children and maintaining their home. During the year, she remarried. For 1971, she filed *Married Filing Separately*, reporting $38,486 of taxable income. In 1973, she amended her 1971 to claim *Head of Household* status and filed for a refund of $2,817.[20]

The Barters and Blairs were both dual-earner married couples in 1971. Both couples filed *Married Filing Jointly* tax returns. The Barters reported joint taxable income of $20,488. The Blairs reported $25,147. Both couples subsequently claimed a refund for the taxes that they would have saved had they filed as unmarried individuals, $161 for the Barters[21] and $480 for the Blairs.[22]

In all three cases, the plaintiffs claimed that the tax rate schedule, 26 U.S.C §1 of the Internal Revenue Code of 1954, violated their constitutional rights. All three plaintiffs are residents of Indiana, a non-community property state, and had filed their cases with the U. S. District Court, N.D. Indiana, Fort Wayne Division. Therefore, the court consolidated the cases for the purpose of their ruling. The plaintiffs claimed that:

1) The due process clause of the Fifth Amendment forbids tax rate differentiation by which the tax on the income of one spouse is measured in part by the income of the other spouse.

[20] *Sarah G. Johnson v. U.S.*, Civ. No. F74-111.
[21] *William G. Barter et ux. v. U.S.*, Civ. No. F74-112.
[22] *Ralph D. Blair et ux. v. U.S.*, Civ. No. F74-113.

2) The due process clause of the Fifth Amendment forbids gender-biased tax rate differentiation that results in a greater burden on married female workers than is imposed upon married male workers.
3) The due process clause of the Fifth Amendment forbids marital classification by which higher tax rates are imposed on the taxable income of a married person (whose spouse has significant income) than are imposed on the same taxable income of an unmarried person.
4) The due process clause of the Fifth Amendment forbids classification by which higher tax rates are imposed on the taxable income of a married person who lives with her spouse than are imposed on the taxable income of one who does not.
5) The free exercise clsue of the First Amendment prohibits the imposition of higher tax rates on those who practice their religious beliefs in regard to marriage.
6) g. The fundamental right to marry, protected by the First, Fourth, Fifth, Ninth and Tenth Amendments is violated by a tax rate differentiation which imposes higher tax rates on the taxable income of a married person (whose spouse has significant income) than on the same taxable income of an unmarried person.[23]

In other words, the plaintiffs claimed that the tax code violated their constitutionally protected rights (1) by forcing a married individual's income tax liability to be affected by another taxpayer's income (i.e., his/her spouse's income), (2) by discriminating against women, (3) by taxing married working couples more than unmarried couples, (4) by linking the income tax liability to the couple's cohabitation status, (5) by interfering with the free exercise of their religious beliefs, and (6) by interfering with their fundamental right to marry. While the court acknowledged that the dual-earner marriage tax penalty exists, it rejected all of the plaintiffs' claims. The court stated that the penalty is gender neutral, does not rise to the level of a prohibition on marriage, and that the legislature, as tax experts, would correct this inequity if they could identify a reasonable alternative tax system (Gerzog, 1978). Later, the

[23] *Johnson v. United States,* 422 F. Supp. 958, 963 (1976)

constitutionality of the marriage tax penalty was again upheld in the Second Circuit in *Druker v. Commissioner*.[24]

The Fundamental Right of Marriage

While the discussion appears a little strained, the *Johnson* court eventually "*recognizes the fundamental nature of marriage and the freedom to marry under the Constitution.*"[25] The court also recognizes that any statute that burdens a fundamental right must be examined with strict scrutiny, as provided in *Shapiro v Thompson.*[26] It is the government that has the burden of demonstrating that the statute is necessary to promote a compelling government interest and that there is no alternative "*reasonable* [way] *to achieve these goals with a lesser burden on constitutionally protected activity*."[27]

The court ruled in the government's favor and declared that "*it is obvious that the Government has a compelling interest to justify this legislation*."[28] Specifically, the tax system is designed to "*reduc*[e] *the differential between single and married taxpayers, and* [maintain] *equal taxes for equal income married couples.*"[29] Citing "*at least one scholar*," the imposition of a marriage tax penalty on some two-earner couples is the inevitable result of these two goals.

We ask the following question, *why are either of these goals a legitimate, compelling government interest to support a statute that burdens a fundamental right?* First, why is it important to equalize single and married taxpayers? The *Johnson* court acknowledges that, at

[24] 397 F.2d 46 (2d Cir. 1982)
[25] *Johnson v. United States,* 422 F. Supp. 958, 972 (1976)
[26] 394 U.S. 618 (1969)
[27] *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)
[28] *Johnson v. United States,* 422 F. Supp. 958, 974 (1976)
[29] *Id.* at 974

the time of the ruling, only 37.5% of single taxpayers maintained their own home, while approximately 50% of single taxpayers resided with their parents. Therefore, we propose that single taxpayers are commonly not equivalent to married couples. Second, and perhaps even more critical, *why is it important to equate single earner and dual earner married households?* If both partners must work outside of the home to make as much as a single-earner household, there is probably very little about the two households that is equivalent. Childcare costs can be extremely burdensome, but they are only one expense. The dual-earner couple must support two commutes, two wardrobes, and the countless list of responsibilities that must be shared by two individuals that split their time between career and family. A full-time homemaker, whose time is dedicated to the house and family may relieve the household from countless burdensome expenses. Therefore, we propose that a single-earner household is not equivalent to an equally-earning two-earner household. Consequently, we propose that there should be no compelling government interest to maintain equal taxes between single and married taxpayers and equal income married households.

The court's finding of a compelling government interest appears linked to a preference to support single-earner married households. First, the court finds it important to "*emphasize[] that the tax rate schedules do not in all instances disadvantage those who are married*." Specifically, single-earner households benefit from a marriage tax subsidy, rather than bear the cost of the dual-earner penalty. By emphasizing that the traditional nuclear family benefits under the tax system, the court is emphasizing the single-earner marriage tax subsidy influenced the ruling. In other words, the decision of the court was influenced by *who* is penalized under the tax system, almost flagrantly inconsistent with a constitutional right to due process and equal protection under the law. Second, the court states that it is "inevitable" that single earners will marry to

support single-earner households, which the current tax system rewards with lower taxes. These statements suggest that the court's ruling is less based on a legitimate government interest, and more based on the court's biases preference for single-earner households.

In addition, the court fundamentally dismissed the government's burden to demonstrate that there is no other reasonable means of serving the compelling interest. To support this maneuver, the court relied on *San Antonio Independent School District v Rodriquez* (Rodriquez).[30] In *Rodriquez*, SCOTUS referred to the tax system as an "*arena in which no perfect alternatives exist*."[31] The *Johnson* court interpreted this quote as a statement of "fact," which establishes that the Government cannot possibly demonstrate that a less burdensome means exists. Based on the belief that the Government cannot meet the burden, the court determined that the burden must be waived.

To promote marriage and support married households, any difference between married and unmarried couples should err on the side of rewarding married couples, particularly those with dependent children. Therefore, we propose that the government should attempt to provide horizontal equity to equally situated households, regardless of marital status, rather than attempting to equalize equal income married household. A married dual-earner household should incur the same federal income tax liability as a similarly situated unmarried couple. The federal government should not provide a marriage tax penalty, or any financial burden that interferes with the fundamental right of couples to marry. Further, the federal government should not *take sides* and attempt to force one partner to abandon his or her career. This is an

[30] 411 U.S. 1 (1973).
[31] *Id* at 41.

individual decision that should remain with the family and not be imposed based on the personal preference of any particular judge.

The Evolution of the Cost – From an Added Tax to a Prohibition

Regardless of the supporting arguments, the Johnson decision appears motivated the court's firm belief that the plaintiffs and those couples affected by the marriage tax penalty can afford the added expense. First the court makes it clear that the couples do not claim that the penalty prevented them from marrying. In light of the fact that all of the plaintiffs were married, the discussion on this obvious point seems unnecessary, unless the court felt that the financial impact of the tax was important. Second, the court repeatedly states that the marriage tax penalty only applies when both partners have "significant" income, and that single-earner households are completely exempt. Again, implying that the marriage tax penalty is permissible because it is only applicable to those couples who can afford the extra expense.

A closer examination of the plaintiffs' financial situations may help to explain the court's focus on the plaintiffs' wealth. Table 1 presents the plaintiff's earnings in 1971 and 2018 dollars. In 1971 Indiana, Sarah Johnson was the exception, earning individually an estimated $42,686, or more than $236,000 in 2018 dollars. In 2018 dollars, the Barters and Blairs earned more than $143,000 and $171,000, respectively. Especially considering that these couples all lived in the state of Indiana, these were not low-income households. However, once again, we contend that the determination of the court should not depend on *who* is the injured party. In other words, it should not be permissible to violate an individual's right to due process and equal protection just because s/he is wealthy.

While the marriage tax penalty did not *prohibit* the plaintiffs from marriage, recent evidence indicates that this may not be the case for all couples. Cheng, Crumbley, Enis, and Yurko (2018) examine the influence of the dual-earner marriage tax penalty. This study documents both that (1) the dual-earner marriage tax penalty is largest, as a percentage of household income, for those couples with adjusted gross income between $30,000 and $80,000 and (2) that the penalty has the greatest deterrent effect on those couples in the lowest income brackets, specifically the lowest one-third of the population. Consistent with Cheng et al. (2018), the plaintiffs in the Johnson case would have been little affected by the penalty because they were all in the top one-third of the population, based on their total household income.

The Barter's and Blair's penalties were both less than 2%. In 2018, a couple with $50,000 of adjusted gross income, supporting two minor children, incurs a very costly marriage tax penalty of $4,236 per year.[32] At 8.5% of adjusted gross income, this penalty is so burdensome that it may *prohibite* couples from marrying. If the penalty is just a burden, without rising to the level of a barrier, the marriage tax penalty violates the constitutional right to due process and equal protection under the law. If the penalty rises to the level of a prohibition, the penalty may violate additional constitutionally protected rights. For example, the First Amendment prohibits any "*governmental regulation of religious beliefs*."[33] Because some faiths prohibit unmarried cohabitation, the tax system should not prohibit couples from following their religious convictions by imposing an 8.5% penalty. An annual penalty of $4,000 may simply be too costly for many couples who must decide between marriage and providing for their families.

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[32] https://www.taxpolicycenter.org/taxvox/tpc-releases-updated-marriage-penalty-and-bonus-calculator-2018-including-tcja

[33] *Sherbert v. Verner*, 374 U.S 398, 402 (1963)

IV. Conclusion

The Supreme Court of the United States has yet to hear arguments both for and against the marriage tax penalty. Because the legislature has failed to correct this inequity, it is time for the court to address this penalty and agree to hear the next legitimate challenge. The marriage tax penalty is not a simple quirk of the tax code, it is a costly burden that may interfere with a couple's fundamental right to marry. When the legislature infringes on a fundamental right, it is the responsibility of the court to take up the challenge and uphold constitutionally guaranteed rights. We propose that the Johnson ruling does not properly interpret the constitution, and that an unbiased review of the dual-earner marriage tax penalty will produce a different result.

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Table 1: The plaintiffs' estimated taxable income and marriage tax penalties in 1971and 2018 U.S. Dollars

	1971 U.S. Dollars			2018 U.S. Dollars		
	Johnson	Barters	Blair	Johnson	Barters	Blair
Joint Taxable Income		20,488	25,147		125,796	154,403
Individual Taxable Income	38,486			236,304		
Standard Deduction	1,500	1,500	1,500	9,210	9,210	9,210
Personal Exemptions	2,700	1,350	1,350	16,578	8,289	8,289
$675 each						
Estimated AGI	42,686	23,338	27,997	262,092	143,295	171,902
Marriage Tax Penalty	2,817	161	480	17,296	989	2,947
Percentage of Income	6.6%*	0.7%	1.7%	6.6%*	0.7%	1.7%

*Sarah Johnson's husband's income was never disclosed. Therefore, the percentage of total household adjusted grow income cannot be estimated.
cpi inflation calculator Dec 1971 through Sept 2018
https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1&year1=197112&year2=201809