THE SUPREME COURT'S TWO-LEVEL APPROACH TO TESTING FREEDOM OF SPEECH

1. The law is judged for *vagueness* and *overbreadth*.
2. What remains is classified as either *level-one* or *level-two* expression.
3. Level-one expression is worthy of testing; level-two expression is not.

FREE SPEECH CASE

DECISION 1
General tests of *all* laws:
1. Vagueness
2. Overbreadth

DECISION 2
Expression is classified as
1. Speech
2. Nonspeech

DECISION 3

Level One
(Speech: Worthwhile expression is tested.)

***LEVEL ONE:* Expression that is tested (has potential social value)**

1. Degree of Danger Tests

← Strict Control // Maximum Freedom →

Bad-tendency test	Clear-and-present-danger test	Incitement test

2. Balancing (both *general* and *specific*)

Government/Social Interests		Freedom of Speech
(a) General government interests, e.g. (1) Fair Trial (2) National security	**JUDGE DOES WEIGHING**	(a) General principles of freedom, e.g. (1) Free press (2) Informing the public
(b) Specific "ad hoc" interests, e.g. (1) A quiet community (2) Litter-free streets		(b) Specific "ad hoc" interests, e.g. (1) Use of loudspeakers (2) Passing out leaflets

3. Other tests (used less often than the two above)

(a) *Preferred freedom* (in our system, freedom of speech holds a "preferred" position).
(b) Less drastic means (the goal sought should be achieved by other means).

4. A combination of two or more of the above.

Level Two
(Nonspeech: Worthless expression is not even tested.)

***LEVEL TWO:* Expression Not Deserving of Constitutional Protection**
(The reason for this is that such expression is not important to the democratic process, is not essential to the exposition of ideas, and is of little value as a step to truth—as noted in the 1942 case of *Chaplinsky v. New Hampshire.* See the examples listed below.)

1. Includes the *lewd, obscene, profane, defamatory, insulting,* or *"fighting"* words.
2. False and misleading advertising (truthful commercial expression has been given a degree of First Amendment protection in recent years).
3. Includes "speech plus" (i.e., speech combined with action, such as blocking the entrance to a building while holding signs or shouting slogans). Such action is "nonspeech," or *conduct,* and is not essential as a step to truth. Therefore, "speech plus" is less deserving of First Amendment protection than is "pure speech."