sis for all separation of power cases or it may turn out to be but an exception to the Court's dual approach.[18]

Although the two analytical approaches have been characterized in various ways, the names generally attached to them have been "formalist" (applied to the more strict line of cases) and "functional" (applied to the less strict). The formalist approach emphasizes the necessity of maintaining three distinct branches of government by drawing bright lines demarcating them and distinguishing among them based on their respective roles.[19] The functional approach emphasizes the core functions of each branch and asks whether the challenged action threatens the essential attributes of such branch's functions. Under this approach, there is considerable flexibility afforded the moving branch—usually Congress acting to make structural or institutional change—if there is little significant risk of impairment of a core function or if there is a compelling reason for the action.[20]

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[18] The tenor of a later case, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252 (1991), was decidedly formalistic, but it involved a factual situation and a doctrinal predicate easily rationalized by the principles of *Morrison* and *Mistretta*, aggrandizement of its powers by Congress. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), reasserted the fundamental status of *Marathon*, again in a bankruptcy courts context, although the issue was the right to a jury trial under the Seventh Amendment rather than, strictly speaking, a separation-of-powers question. Freytag v. Commissioner, 501 U.S. 868 (1991), pursued a straightforward appointments-clause analysis, informed by a separation-of-powers analysis but not governed by it. Finally, in Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 467 (1989) (concurring), Justice Kennedy would have followed the formalist approach, but he explicitly grounded it on the distinction between an express constitutional vesting of power as against implicit vestings. Separately, the Court has for some time viewed the standing requirement for access to judicial review as reflecting a separation-of-powers component—confining the courts to their proper sphere – Allen v. Wright, 468 U.S. 737, 752 (1984), but that view seemed largely superfluous to the conceptualization of standing rules. However, in Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992), the Court imported the take-care clause, obligating the President to see to the faithful execution of the laws, into standing analysis, creating a substantial barrier to congressional decisions to provide for judicial review of executive actions. It is not at all clear, however, that the effort, by Justice Scalia, enjoys the support of a majority of the Court. Id. at 579–81 (Justices Kennedy and Souter concurring). The cited cases seem to demonstrate that a strongly formalistic wing of the Court continues to exist.

[19] "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . must be resisted. Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable." INS v. Chadha, 462 U.S. 919, 951 (1983). *See* id. at 944–51; Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–66 (1982) (plurality opinion); Bowsher v. Synar, 478 U.S. 714, 721–727 (1986).

[20] CFTC v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 587, 589–93 (1985). The Court had first formulated this analysis in cases challenging alleged infringements on presidential powers, United States v. Nixon, 418 U.S. 683, 713 (1974); Nixon v. Administrator of General Services, 433 U.S. 425, 442–43 (1977), but it had subsequently turned to the more strict test. *Schor* and *Thomas* both involved provisions challenged as infringing judicial powers.