Politics and the Court

When it comes to pushing the line between law and politics, Justices Antonin Scalia and Clarence Thomas each had a banner month in January.

Justice Scalia, who is sometimes called “the Justice from the Tea Party,” met behind closed doors on Capitol Hill to talk about the Constitution with a group of representatives led by Representative Michele Bachmann of the House Tea Party Caucus.

Justice Thomas, confirming his scorn for concern about conflicts of interest and rules designed to help prevent them, acknowledged that he has failed to comply with the law for the past six years by not disclosing his wife’s income from conservative groups.

In Supreme Court opinions, they showed how their impatience for goals promoted in conservative politics is infecting their legal actions. They joined in an unusual dissent from a court decision not to take a case about the commerce clause that turned into polemic in favor of limited government. In an important privacy case, NASA v. Nelson, they insisted the court should settle a constitutional issue it didn’t need to.

Constitutional law is political. It results from choices about concerns of government that political philosophers ponder, like liberty and property. When the court deals with major issues of social policy, the law it shapes is the most inescapably political.

To buffer justices from the demands of everyday politics, however, they receive tenure for life. The framers of our Constitution envisioned law gaining authority apart from politics. They wanted justices to exercise their judgment independently — to be free from worrying about upsetting the powerful and certainly not to be cultivating powerful political interests.

A petition by Common Cause to the Justice Department questioned whether Justices Scalia and Thomas are doing the latter. It asked whether the court’s ruling a year ago in the Citizens United case, unleashing corporate money into politics, should be set aside because the justices took part in a political gathering of the conservative corporate money-raiser Charles Koch while the case was before the court.
If the answer turns out to be yes, it would be yet more evidence that the court must change its policy — or rather its nonpolicy — about recusal.

One possible reform would be to require a justice to explain, in a public statement and in detail, any decision to recuse or not. It would be even better to set up a formal review process. A group of other justices — serving in rotation or randomly chosen — could review each decision about recusal and have the power to overrule it.

In the NASA case, the two justices issued opinions on a unanimous ruling that NASA can require background checks for contract workers. Six justices (Justice Elena Kagan was recused) said the court didn’t need to decide whether there is a right to informational privacy.

Justices Scalia and Thomas, on the other hand, insisted that the Constitution doesn’t protect such a right and the court should settle the issue. The Scalia opinion is a rambling, sarcastic political tirade. The Thomas opinion is short but caustic. This is the sort of thing that gets these justices invited to gatherings like Mr. Koch’s.

About Justice Scalia, the legal historian Lucas Powe said, “He is taking political partisanship to levels not seen in over half a century.” Justice Thomas is not far behind.

Both seem to have trouble with the notion that our legal system was designed to set law apart from politics precisely because they are so closely tied.