One explanation is that Congress did not include a general grant to the citizenry of a right to sue, which would constitute, in effect, an invitation to do so. Would-be litigants therefore must comb through the law and regulations looking for possible chinks in the federal government’s armor.

Last August a public-interest law firm in California, Public Advocates, thought it had found a chink in the Department of Education’s interpretation of the “highly qualified” teacher provision of NCLB. In Renee v. Spellings, filed in a federal district court in San Francisco, Public Advocates argued that the department had flouted the law by permitting employment of teachers still in training. NCLB required that all of the nation’s public school teachers be “highly qualified” by the end of 2005–06 and set as a standard that they have a bachelor’s degree, meet state licensure requirements, and demonstrate competence in a core subject. Many of the nation’s teachers, especially in the poorest urban districts and in the 5,000 school districts classified as rural, had fallen short of that standard. Congress’s approach to this shortage of formally trained teachers was to decree that it was unlawful.

When a law and social realities are seriously at odds, as in this case, administrators must employ flexibility and ingenuity to make the law “work,” or appear to. One of several approaches devised by the department was to allow so-called alternative-route teachers to teach for up to three years while seeking certification. (An “alternative route” is meant to facilitate entry of teachers who have not followed a standard teacher-training curriculum.) Attacking the three years of grace as a “major loophole,” Public Advocates asked the court to strike it down, asserting that 100,000 teachers nationwide had slipped through the loophole, 10,000 in California alone, which it took to be a measure of injustice but might be thought from a different political perspective to be an indicator of districts’ needs. The will of Congress is deeply ambiguous, because the law says both that alternative-route teachers satisfy the mandate and that full licensure cannot be waived provisionally.

A more tantalizing target of NCLB litigation has been a provision, dating from the mid-1990s and authored by Republicans who were trying to protect state governments from unfunded mandates, that says, “Nothing in this act shall be construed to...mandate a state or any subdivision thereof to spend any funds or incur any costs not paid for under this act.”

In 2005 two sets of litigants mounted suits with this language in an effort to secure more federal funding or relief from federal requirements, but were not expected by legal analysts to get far (see “NEA Sues over NCLB,” legal beat, Fall 2005). The state of Connecticut, most of whose claims have been dismissed by a federal judge in New Haven, in fact has not gone far. And the other case, which was brought by the National Education Association in collaboration with several school districts in Michigan, Texas, and Vermont, appeared headed for oblivion when the trial judge dismissed it. But the plaintiffs appealed, and in January of this year a three-judge panel of the Sixth Circuit ruled 2 to 1 in their favor (see “Accountability Left Behind,” features, page 43).

Rather than oblivion, Pontiac v. Spellings, as this case is known, could be heading eventually for the Supreme Court, which has the last word on states’ obligations under grant-in-aid statutes. The case has been remanded to the district court with an admonition that statutes enacted under the spending clause of the Constitution must provide "clear notice" of their liabilities should states accept the federal funding, along with the majority’s judgment that in NCLB, Congress failed to do that.

In the meantime, Congress continues to struggle with reauthorizing NCLB, and if some of the law’s critics have their way (see “The Enforcers,” legal beat, Fall 2007), the revised version will expand the opportunities to sue.

Joshua Dunn is assistant professor of political science at the University of Colorado–Colorado Springs. Martha Derthick is professor emerita of government at the University of Virginia.