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### October 7, 2009: The Temptations of Standing

Bruce Ledewitz

*Duquesne University*, ledewitz@duq.edu

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Title: The Temptations of Standing

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10/7/2009—I was thinking of Alex Bickel's concept of the "passive virtues" as I listened to NPR's story about today's oral argument in *Buono v. Kempthorne*. This is the case about the WWI memorial that began as Latin Cross privately, and illegally, erected on public land. How tempted the Justices are going to be to decide the case on the ground that the plaintiff, who merely passes the cross every day, lacks standing to bring the case. Not only would such a ruling decide today's case but it would potentially end most of the litigation that currently takes place around issues of church and state. I hope the Supreme Court will resist this temptation. If the Court had never entered the field of church and state, we might as a people have muddled our way to compromises over religious imagery in the public square. But the Court did enter the fray in 1947 and ever since has promised government neutrality toward religion. It is that promise that the ACLU has been trying to redeem. If the Court decides that the separation of church and state is no longer an issue that can be litigated, it will be leaving the matter to a politics poisoned by the Court's constitutional vision. The politics that moves into the resulting vacuum will not be healthy, as secularists claim that the forces of religion are violating the Constitution and supporters of religious imagery dishonestly claim that they are not foisting religion on the rest of the country. Leaving the field is particularly troublesome in *Buono* because the image at issue, a cross, is not a generic symbol of religion but a particular Christian symbol. Shortly after a standing ruling, legislation may be introduced to change the Pledge of Allegiance to "One Nation under Christ". The way for the Court to end divisive litigation over church and state is not to close the courts but to answer the question of religion in the public square. My proposal, for example, is for the Court to retain neutrality but to defer to a plausible government claim that a religious symbol is being used to communicate a non-religious message. In *Buono* that means accepting the government's claim that the cross was used as a universal symbol of military sacrifice in WWI. This is certainly plausible. And then we could all hold the government to its word: religious symbols can sometimes be used in the public square, but only when their nonreligious meaning is palpable.