IN THE SUPREME COURT OF TEXAS

NO. 09-0257

CITY OF DALLAS, PETITIONER,

v.

HEATHER STEWART, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued February 16, 2010

JUSTICE GUZMAN, joined by JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE JOHNSON, dissenting.

The upsurge of abandoned buildings caused by the subprime mortgage debacle and the recent recession is well known, as are the difficulties it has caused for cities.[1] Abandoned, vandalized, dangerous buildings constitute a major threat to the safety and vitality of entire neighborhoods.[2] The Legislature has enacted a comprehensive statutory scheme enabling cities to address this complex

[1] *See, e.g.*, Kristin M. Pinkston, *In the Weeds: Homeowners Falling Behind on Their Mortgages, Lenders Playing the Foreclosure Game, and Cities Left Paying the Price*, 34 S. ILL. U. L.J. 621, 627–33 (2010).

[2] Melissa C. King, *Recouping Costs for Repairing "Broken Windows": The Use of Public Nuisance by Cities to Hold Banks Liable for the Costs of Mass Foreclosures*, 45 TORT TRIAL & INS. PRAC. L.J. 97, 98–101 (2009); *see generally* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

problem. Central to that scheme, summary nuisance abatement is a crucial, front-line tool for cities to deal with an otherwise overwhelming crisis.[3]

Today, the Court holds that "substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Article I, Section 17 of the Texas Constitution," and thus concludes that a party whose real property has been determined a nuisance is entitled to an absolute right to de novo judicial review of the underlying nuisance determination made by an administrative board when the person alleges a taking. By doing so, the Court misses the crux of the constitutional issue here: do the procedures created by the Legislature for abatement of urban nuisances violate the due process rights of property owners? Our nuisance precedents establish that due process does not necessitate a de novo judicial determination that a condition is a nuisance if the Legislature has both (1) properly declared that the condition in question is a nuisance and provided for its summary abatement, and (2) specified a different standard of review of such an abatement. Here, the Legislature has done both. Moreover, the Court's justifications for requiring de novo review are founded on misinterpretations of the precedents of both this Court and the United States Supreme Court. Accordingly, I would reverse the court of appeals' judgment, and give preclusive effect over the property owner's takings claim to the administrative board's finding that the house was a nuisance, as confirmed on substantial evidence review by the trial court. I therefore respectfully dissent.

I. Proper Abatement of a Public Nuisance Does Not Constitute a Taking

[3] *See, e.g.*, King, *supra* note 2, at 99; Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 129–30 (2009).

A. Due Process

Although the Court rushes to apply the Takings Clause, the correct inquiry is whether there was proper abatement of a public nuisance, consonant with due process. As the Supreme Court has explained, proper abatement of a public nuisance does not constitute a taking. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992); *Samuels v. McCurdy*, 267 U.S. 188, 196 (1925) ("The exercise of the police power by the destruction of property which is itself a public nuisance . . . is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."). Due process distinguishes proper abatement of a nuisance from the improper deprivation of property. *See Samuels*, 267 U.S. at 196; *Crossman v. City of Galveston*, 247 S.W. 810, 813 (Tex. 1923) (invalidating on due process grounds an ordinance that made city commissioners' nuisance finding final); *Stockwell v. State*, 221 S.W. 932, 935 (Tex. 1920) (concluding that judicial review of administrative determination of what constitutes a nuisance is required because "nothing less would amount to due process of law, without which the Bill of Rights declares no citizen shall be deprived of his property"); *Bielecki v. City of Port Arthur*, 12 S.W.2d 976, 978 (Tex. Comm'n App. 1929, judgm't adopted) (reasoning, on review of an ordinance declaring that all dance halls located within 150 feet of residences were nuisances, that "denial of the right of a citizen to so use his property is a deprivation of the property itself, hence falls within the protection afforded by the due process clauses of both State and Federal Constitutions").

Due process is a flexible concept, and its precise requirements depend on the particular situation in question.[4] *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). In weighing a due process question, we must determine whether the claimant has a property interest requiring protection, and, if so, what process is due. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). Here, Heather Stewart had a property interest requiring protection—the demolished house. The only remaining issue under these facts is what process did she have a right to—if the procedure utilized to find that Stewart's house was a nuisance afforded her due process, then as a matter of law there cannot have been a taking. *See Samuels*, 267 U.S. at 196. In this case, the only part of the process afforded to Stewart that she challenges is the Legislature's determination that review of the Dallas Urban Rehabilitation Standards Board's (the Board) nuisance finding is governed by the substantial evidence rule. *See* TEX. LOC. GOV'T CODE § 214.0012(f).

B. The Legislature's Authority to Abate Nuisances

For over a century, this Court has recognized the Legislature's authority to determine that a condition is a nuisance, and to provide for its summary abatement. As far back as 1876, we explained that the Legislature could declare that wooden buildings are nuisances under certain circumstances, and could so authorize their abatement. *See Pye v. Peterson*, 45 Tex. 312, 313–14 (1876) (holding that a city could not treat wooden buildings as nuisances absent a specific grant of such authority from the Legislature). This understanding is consistently echoed in our subsequent

[4] The Court asserts that I present no "logical reason" for treating this nuisance case differently from an eminent domain case. __ S.W.3d __ n. 21. To the contrary, the distinction is not only logical, it is followed by the Supreme Court. *See Samuels*, 267 U.S. at 196. The exercise of eminent domain is not the same thing as nuisance abatement. *Compare generally* 54 TEX. JUR. 3D *Nuisances* (2010), *with* 32 TEX. JUR. 3D *Eminent Domain* (2008).

decisions. *See Crossman*, 247 S.W. at 812; *Stockwell*, 221 S.W. at 934 ("The State, in the exercise of its public power, may denominate certain things to be public nuisances, and because of their having that character provide for their summary abatement.").

Consequently, we have long recognized that the Legislature, pursuant to its authority to declare and abate nuisances, can confer to agencies or municipalities (by statute or grant of authority, as in a municipal charter) the ability to abate a specified nuisance, as defined by the legislative grant. *See Crossman*, 247 S.W. at 812; *Pye*, 45 Tex. at 314 (noting that the Legislature has the power to authorize municipalities to prohibit wooden buildings as nuisances). There are, however, limits to the Legislature's authority.

First, the Legislature cannot declare something a nuisance that is not so in fact. *City of Houston v. Lurie*, 224 S.W.2d 871, 874 (Tex. 1949) ("'This power is limited to declaring only those things to be such nuisances which are so in fact, since *even the State may not denounce that as a nuisance which is not in fact.*'" (quoting *Crossman*, 247 S.W. at 814)); *Crossman*, 247 S.W. at 812 ("Not even the Legislature can declare that a nuisance which is not so in fact."). A "nuisance in fact" is a condition that "endangers the public health, public safety, public welfare, or offends the public morals." *State v. Spartan's Indus., Inc.*, 447 S.W.2d 407, 413 (Tex. 1969). It is an otherwise unoffending condition that becomes a nuisance "by reason of its circumstances or surroundings." 54 TEX. JUR. 3D *Nuisances* § 5 (2010). In other words, the Legislature may not declare a condition to be a nuisance that, by reason of its circumstances, does not endanger public health, safety, welfare, or morals.

Second, the Legislature cannot delegate an open-ended authority to define nuisances to agencies or municipalities; rather, in authorizing abatement, the Legislature itself must define the nuisance in question. *See City of Texarkana v. Reagan*, 247 S.W. 816, 817 (Tex. 1923); *Stockwell*, 221 S.W. at 934. That grant is further subject to a due process requirement of judicial appeal when an agency or municipality acts under such legislative authorization. *See Crossman*, 247 S.W. at 813; *Stockwell*, 221 S.W. at 935; *see also Brazosport Sav. & Loan Ass'n v. Am. Sav. & Loan Ass'n*, 342 S.W.2d 747, 750–51 (Tex. 1961).

The Court concludes that only a court is competent to ultimately determine whether a building is a nuisance, and that any such determination by an agency is always subject to de novo review, despite a legislative determination that the substantial evidence rule should apply. Though I agree with the Court that a nuisance determination is *generally* "a justiciable question," *Crossman*, 247 S.W. at 813, our precedents do not require de novo judicial determination in every case of this nature in order to satisfy due process. A survey of our precedents in this area instead demonstrates that de novo review is *not* required if the Legislature has *both* (1) properly defined the nuisance and authorized its abatement, and (2) provided for a different standard of review of such an abatement.

In *Stockwell*, the commissioner of agriculture did not merely determine that the particular hedge in question was a nuisance; instead, he determined that the *type* of citrus disease infecting the region was a nuisance under the general, catch-all provision of the statute in question. *See Stockwell*, 221 S.W. at 934. In other words, the commissioner effectively set the boundaries of his own authority by defining for himself what constituted a nuisance. *See id.* We held that Stockwell had a right to a judicial determination of whether citrus canker was a nuisance because the

Legislature had not defined it as one, not because that right exists always and in every circumstance.[5] *See id.* at 935.

Similar issues confronted this Court in *Crossman*. The principal due process defect in that case was that the municipality lacked authorization from the Legislature to abate the type of nuisance in question. *See Crossman*, 247 S.W. at 811–12. Specifically, the Legislature, through the city's charter, had defined and authorized the abatement of wooden buildings constituting a fire hazard, but had not authorized the abatement of buildings that were merely dilapidated. *Id.* Accordingly, we held that a city ordinance, purporting to authorize the abatement of dilapidated buildings, was invalid for exceeding the authority given to the city by the Legislature. *Id.* at 812.

In *Reagan*, we invalidated another city ordinance, holding that "this ordinance, in so far as it makes final the orders of the city council declaring the building a nuisance . . . is void." *Reagan*, 247 S.W. at 817. Once again, the municipality in question lacked proper legislative authorization *defining* the nuisance in question. *See id.* at 816 (noting that the city council was purportedly "authorized by its charter to *define* and abate nuisances," and questioning the validity of the charter accordingly) (emphasis added).

Finally, in *Lurie*, we twice recognized the Legislature's authority to declare a condition to be a nuisance. *Lurie*, 224 S.W.2d at 875 (noting that judicial determination that a condition is a

[5] The *Stockwell* opinion clearly distinguished between (1) the commissioner's determination that citrus canker was a nuisance generally, and (2) the particular finding that Stockwell's hedge should be destroyed as a result. *See Stockwell*, 221 S.W. at 935 ("Viewing the powers given the Commissioner by this statute and his attempted exercise of them here, the inquiry naturally arises as to what are the rights of the defendant if the Commissioner was mistaken in his judgment that citrus canker was a contagious plant disease, destructive of citrus fruits, *or* as to its being necessary to destroy . . . all of the trees in the defendant's hedge.") (emphasis added).

nuisance is required unless it is "property . . . within the class designated and condemned by statute . . . as a nuisance"); *id.* at 877 ("*[U]nless* property is of the class *condemned by statute* . . . as a nuisance, the question whether it is in fact a nuisance is for judicial determination.") (emphasis added). We also construed—without any doubts as to its validity—the specific statute the Legislature had enacted pursuant to that power, authorizing the abatement of defined nuisances: "dangerous or dilapidated buildings or buildings [constituting a] fire hazard." *Id.* at 874. We observed: "'The State, in the exercise of its public power, may denominate certain things to be public nuisances, and because of their having that character provide for their summary abatement.'" *Id.* (quoting *Crossman*, 247 S.W. at 814).

Thus, although *Lurie* goes on to state there is a right to judicial determination of whether a property is a nuisance, that right only arises when the Legislature or common law has not already defined the class of things in question as a nuisance. *Id.* at 875, 877. Of course, where the Legislature has made such a determination, due process still guarantees a qualified judicial review, but does not require that the review be de novo. *Cf. City of Houston v. Blackbird*, 394 S.W.2d 159, 160–61 (Tex. 1965). Nor did *Lurie* announce any general right to de novo appeal. Instead, it simply declined the city's invitation in that case to limit appeal to substantial evidence review without guidance from the Legislature, based *in part* on the importance of the rights in question, but equally on the lack of legislative authorization. *See Lurie*, 224 S.W.2d at 875–76. Therefore, under *Lurie*, due process does not require that the judicial review be de novo, if the Legislature, in its grant of authority to abate a defined nuisance, has provided for a lesser standard of review. *See id.* at 876 (declining to apply substantial evidence review because no statute authorized doing so).

Here, the Legislature has authorized cities to abate a particular nuisance, and has specifically defined it as:

> [A] building that is: (1) dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare; (2) regardless of its structural condition, unoccupied by its owners, lessees, or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of haborage or could be entered or used by children; or (3) boarded up, fenced, or otherwise secured in any manner if (a) the building constitutes a danger to the public even though secured from entry; or (b) the means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described in Subdivision (2).

TEX. LOC. GOV'T CODE § 214.001(a)(1)–(3). This definition of what constitutes a nuisance is specific, and constitutes a nuisance in fact. *See Spartan's Indus.*, 447 S.W.2d at 413 (observing that a nuisance in fact is a condition that "endangers the public health, public safety, public welfare, or offends the public morals"). Thus, unlike the statute in *Stockwell*,[6] or the charter in *Reagan*,[7] the

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[6] The Court inappropriately reasons that the statutes in *Stockwell* and in this case are equivalently broad, *see* __ S.W.3d __, but they are not. The relevant statute in *Stockwell* was a general, catch-all provision: "'*or other injurious insect pests or contagious diseases of citrus fruits*.'" *Stockwell*, 221 S.W. at 934 (quoting former TEX. CIV. STAT. art. 4459). By contrast, as discussed above, the statute here (1) specifically defines the nuisance, (2) is limited by its terms to nuisances in fact, and (3) contains no catch-all provision such as the one in *Stockwell*. *See* TEX. LOC. GOV'T CODE § 214.001(a)(1)–(3). Thus, unlike the statute in *Stockwell*, the statute here would not permit the Board to determine that a building is a "nuisance" when that building is not a nuisance in fact, nor does the statute purport to give the Board authority to determine what kind of condition is a nuisance.

[7] The Court's comparison of the charter in *Reagan* and the instant statute also fails. The charter in *Reagan* was not limited to nuisances in fact because *any* dilapidated building could purportedly be demolished pursuant to the charter, and the *Reagan* Court accordingly suggested that the charter was invalid on this point because not even the Legislature can declare something a nuisance that is not so in fact. *See Reagan*, 247 S.W. at 817; *Stockwell*, 221 S.W. at 934. But here, section 214.001 *is* limited to conditions that are nuisances in fact.

The Court attempts to explain away this distinction by invoking the last antecedent rule to misconstrue section 214.001 as allowing demolition of homes for merely being "dilapidated" or "substandard," and reasons that the definition is thus not limited to nuisances in fact. __ S.W.3d __ n.14. However, that canon of construction is "'neither controlling nor inflexible.'" *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (quoting *City of Corsicana v. Willmann*, 216 S.W.2d 175, 176 (Tex. 1949)). Moreover, the Legislature is presumed to know existing law when it enacts a statute, *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990), and when the Legislature enacted section 214.001 in its current form, it was already established that being dilapidated alone does not make a building a

grant in question here is circumscribed to specific conditions that constitute a nuisance in fact, and the municipality or agency is not allowed to define the nuisance. Further, the authorization specifies that judicial review is limited by the substantial evidence rule, TEX. LOC. GOV'T CODE § 214.0012(f), which stands in stark contrast to the situation in *Lurie*, where the statute was silent as to the standard of review, *see Lurie*, 224 S.W.2d at 874, 876.

As Justice Johnson notes in his dissent, the Court effectively overturns the statutory system created by the Legislature to facilitate nuisance abatement. This is especially troubling because the Legislature appears to have made every reasonable effort to draft these statutes in accordance with the relevant standards pronounced by Texas courts, including other due process requirements not at issue here. In particular, the statutes provide for: (1) notice and hearing, *compare* TEX. LOC. GOV'T CODE § 214.001(b)(2)–(3), *with Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001), (2) a chance to remedy the nuisance, *compare* TEX. LOC. GOV'T CODE § 214.001(d), *with Crossman*, 247 S.W. at 812, (3) notice to mortgagees and lienholders, *compare* TEX. LOC. GOV'T CODE § 214.001(h), *with State Bank of Omaha v. Means*, 746 S.W.2d 269, 270 (Tex. App.—Texarkana 1988, writ denied), (4) a right to judicial appeal, *compare* TEX. LOC. GOV'T CODE § 214.0012, *with Blackbird*, 394 S.W.2d at 161; *Crossman*, 247 S.W. at 813; *Stockwell*, 221 S.W. at 934–35, and (5) a clear

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nuisance in fact, *Crossman*, 247 S.W. at 812. Thus, the Court, by construing the statute to authorize abatement of buildings merely for being substandard or dilapidated, imputes to the Legislature an intent it is presumed not to have. When read fairly and as a whole, Local Government Code section 214.001 displays a clear intent by the Legislature to only authorize abatement of nuisances in fact, that is, conditions that are actually dangerous to public health, safety, and welfare.

definition of what constitutes a nuisance in this context, *compare* TEX. LOC. GOV'T CODE § 214.001(a)(1)–(3), *with Stockwell*, 221 S.W. at 934–95.

In addition, there is no need for the novel course the Court embarks on today. Although there are important *substantive* rights behind the procedural issue in this case—i.e., rights under the Takings Clause—creating a new *procedural* entitlement to protect such rights is unnecessary. The right to compensation for takings of private property is a vital one, as evidenced by its enshrinement in both the Federal and Texas Constitutions. Without reservation, I share the Court's laudable concern with preventing uncompensated takings. As such, I note that even under substantial evidence review, it is still possible to prove that an agency's or municipality's action is illegal, *see Brazosport Sav. & Loan Ass'n*, 342 S.W.2d at 752, which might well be relevant if an agency or municipality acts outside of its authority, as by using the nuisance procedures to actually take title to a piece of real property, or by violating the procedures in Local Government Code chapters 54 and 214, or other statutes. Accordingly, our system already provides adequate safeguards for property owners, without thwarting the intent of the Legislature as the Court does.

In summary, the Legislature has both (1) validly defined the nuisance in question and authorized its abatement, TEX. LOC. GOV'T CODE § 214.001, and (2) specified what standard of review applies, *id.* § 214.0012(f). As a result, I would conclude that the urban nuisance statutes at issue comport with our nuisance precedents, and therefore afforded Stewart due process, and thus should have precluded Stewart's takings claim.[8]

[8] The Court asserts that the general rule of de novo determination or review of nuisance findings is "unlikely ever to apply again" under my approach. __ S.W.3d __ n.12. But there are many types of nuisance beyond the narrow scope of the Legislature's authorization of abatement of certain urban nuisances at issue here. For example, there are

II. The Court's Reasons for Disregarding our Nuisance Jurisprudence Fall Short

The Court circumvents our due process nuisance jurisprudence discussed above in favor of a takings inquiry. Its justifications for doing so are (1) a misreading of the extent of our holding in *Steele v. City of Houston*, and (2) an entirely novel application of the constitutional fact doctrine. Both of these justifications fail.

A. Misplaced Reliance on *Steele*

The Court argues that the *Stockwell–Lurie* line of cases described above is no longer valid in light of *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980). This exaggerates the scope of *Steele*. The Court cogently describes *Steele*'s actual effect, which was to make clear that the Takings Clause is self-executing, thereby reversing the prior assumption that the State enjoyed sovereign immunity from takings claims. But the Court then extrapolates that *Steele* also precluded the Legislature from summarily abating nuisances in fact. The problem with that assumption is that *Steele* in no way modified or curtailed the State's police power; instead, it merely removed the shield of sovereign immunity from the exercise of that power. *See id.* at 791 ("The Constitution itself is

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such traditional nuisance actions as abatement of extremely loud noises, *see, e.g.*, *Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217, 218 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.), or smells from a cattle feed lot, *see, e.g.*, *Meat Producers, Inc. v. McFarland*, 476 S.W.2d 406, 409 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.), neither of which fall within the definition of urban nuisance found in section 214.001 of the Local Government Code. Such suits are real and recurring, and will continue to be governed by the general rule—that whether the condition is a nuisance is a judicial question. This is because *Stockwell* and its progeny make clear that the Legislature must specifically define the nuisance in order to provide for its summary abatement. *See Stockwell*, 221 S.W. at 934. The Legislature has done so here, and it is precisely because the definition is *specific* that the statutory scheme does not cover vast areas of nuisance law—leaving the general rule intact in most instances.

the authorization for compensation for the destruction of property and *is a waiver of governmental immunity* for the taking . . . of property for public use.") (emphasis added).

In fact, *Steele* says very little about the question in this case—in *Steele*, there was no due process at all, because the Houston police summarily set fire to the plaintiff's home in an attempt to flush out fugitives, *id.* at 789, nor was the city claiming to abate a nuisance, *see generally id.* *Steele* simply stands for the proposition that the Takings Clause is self-executing, and that sovereign immunity is waived for takings claims. *See id.* at 789. An important point, to be sure, but one that is not relevant where, as here, the Takings Clause is inapplicable because there was a proper nuisance abatement, rather than a taking. *See Samuels*, 267 U.S. at 196.

B. The Constitutional Fact Doctrine

The Court further reaches its conclusion by a novel adoption and application of the constitutional fact doctrine. But there are two important reasons that I would decline to import that doctrine from its proper, federal context.

First, the doctrine is generally applied in the context of the First and Fourth Amendments, not to nuisance or takings questions, as the Court itself admits. __ S.W.3d __; *see, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 697 (1996); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). The common thread in those cases is that the "fact" in question is of highly subjective intent—such as whether an alleged defamer acted with actual malice, or whether the police had probable cause. *See Bose Corp.*, 466 U.S. at 515 (Rehnquist, J., dissenting) (noting that the constitutional fact issue in a First Amendment case is "no more than findings about the *mens rea* of

an author"). Also, such cases involve the *development* and application of complicated, constitutional legal standards. *See Ornelas,* 517 U.S. at 697 (explaining that "the legal rules for probable cause and reasonable suspicion acquire content only through application," thus requiring independent review "if appellate courts are to maintain control of, and to clarify, the legal principles"). By contrast, whether a building is so dilapidated as to constitute a danger to health and safety is not a legal rule that "acquires content" only through independent judicial review. Rather, it is a rule that derives its content from the specific statute in question. *See* TEX. LOC. GOV'T CODE § 214.001(a)(1)–(3). Indeed, a major concern of our nuisance precedents, such as *Stockwell*, was to ensure that cities and agencies only act under a specific statutory definition, limited to nuisances in fact, thus rendering inapplicable here the concerns that motivated the Supreme Court to "reinvigorate" the constitutional fact doctrine.

Second, the Court's reason for applying the doctrine is disquieting, both for its unsound basis, and for the breadth of its potential application in future cases. The Court applies the doctrine merely because "[t]akings claims also typically involve mixed questions of fact and law." __ S.W.3d __. But mixed questions of fact and law abound in our legal system. *See, e.g.*, *Intercont'l Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 666 (Tex. 2009) (Brister, J., dissenting) ("Whether a party prevailed in litigation is a mixed question of law and fact."); *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 518 (Tex. 1997) (explaining that probable cause is "a mixed question of law and fact" in malicious prosecution cases when the parties dispute the underlying facts). Under the Court's reasoning, it appears that every mixed question of fact and law that is even alleged to touch on a constitutional right is now a "question of constitutional fact." Further, it is

unclear how the Court's decision can be squared with our rule that "[w]e review a trial court's decision on a mixed question of law and fact for an abuse of discretion."[9] *State v. $217,590.00 in U.S. Currency*, 18 S.W.3d 631, 633 (Tex. 2000). What is particularly worrisome is that, while the Supreme Court takes pains to cabin both its reasons for applying the doctrine and the doctrine's scope, this Court today provides no such limiting guidance.[10] *See, e.g.*, *Bose Corp.*, 466 U.S. at 510–11; *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 272–73 (1985).[11]

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[9] Although the Court asserts that its holding is limited to "review of agency decisions of substantive constitutional rights," and thus "does no violence" to the general rule, __ S.W.3d __ n.25, that assertion alone does not suffice to cabin the Court's holding, nor does it explicate the relationship between today's opinion and the general rule. The cases cited by the Court on this point, *see id.*, are disparate examples of heightened review in various contexts, and generally do not address the proper framework for review of mixed questions of law and fact in light of the Court's opinion.

[10] As a particularly relevant example, the Court's decision today is contrary to *Crowell v. Benson*, 285 U.S. 22 (1932). In that case, the Supreme Court *limited* the scope of the closely related jurisdictional fact doctrine by noting:

> And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation.

Id. at 58. *Crowell* thus confined its holding to specifically exclude cases just like this one, where the Legislature has provided for administrative bodies to make quasi-judicial determinations as to nonjurisdictional and nonconstitutional facts, and has specified the appropriate scope of review: that of substantial evidence.

The limitation found in *Crowell* is germane here because, although the Supreme Court was addressing the jurisdictional fact doctrine, that doctrine is an English antecedent of the constitutional fact doctrine, Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 249 (1985), and by applying the jurisdictional fact doctrine in the American, constitutional context, the Supreme Court "both confirmed and generalized the constitutional fact doctrine in strong terms," *id.* at 253. "While conceding that *ordinary facts could be established in the administrative process*, the Court held that constitutional facts must be found by the courts." *Id.* (emphasis added).

[11] It is further worth noting that as part of its justification for ignoring the long-established distinction between nuisance abatement and takings, and for invoking the constitutional fact doctrine, the Court relies on *regulatory* takings cases such as *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) and *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984). However, the Court fails to properly distinguish between regulatory and conventional takings. Although this is not a takings case, if it were it would be a conventional taking, not a regulatory taking; Stewart's property was destroyed outright, rather than having its value marginally impaired by a regulation. *See Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 672 (Tex. 2004).

III. Conclusion

The Court's decision opens the door to a host of takings challenges to agency determinations of every sort, and in every such challenge a right to trial de novo will be claimed. Judges at every level of our court system are invited by today's decision to substitute their own factual determinations for that of an agency or even a lower court. The consequences of the Court's decision will not be limited to the courtroom. As discussed above, cities are faced with complex challenges posed by a crisis level of abandoned and dangerous buildings, and one of the most important weapons provided by the Legislature to combat this problem is summary nuisance abatement. It is therefore unsurprising that the Attorney General and almost a dozen cities have rallied in support of the statutes by appearing as amici curiae.[12]

Because the Legislature has both (1) validly defined the nuisance in question and authorized its abatement, TEX. LOC. GOV'T CODE § 214.001, and (2) specified what standard of review applies, *id.* § 214.0012(f), due process does not require de novo review under our precedents. The Board's finding, pursuant to that authority, as affirmed by the trial court on substantial evidence review,

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Because of the differences between regulatory and conventional takings cases, it is generally inappropriate to treat regulatory takings cases as controlling precedent for conventional takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002); *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 801–02 (Tex. 2005) (per curiam). The Court errs when it relies on such cases here.

[12] *See* Brief of the State of Texas as Amicus Curiae, City of Dallas v. Stewart, No. 09-0257 (Tex. Feb. 3, 2010); Brief of Amici Curiae City of San Antonio, Texas, City of Houston, Texas, In Support of Petitioner City of Dallas, *Stewart*, No. 09-0257 (Tex. Sep. 17, 2009); Brief of Amici Curiae the Cities of Aledo, Granbury, Haltom City, Kennedale, Lake Worth, North Richland Hills, River Oaks, Saginaw and Southlake, Texas, *Stewart*, No. 09-0257 (Tex. May 11, 2009).

should have precluded Stewart's takings claim. Accordingly, I would reverse the court of appeals and render judgment that Stewart take nothing.

Eva M. Guzman
Justice

OPINION DELIVERED: July 1, 2011