that affects foreign relations."[491] We must await further litigation to see whether the Court employs this distinction.[492]

THE EXECUTIVE ESTABLISHMENT

Office

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."[493]

Ambassadors and Other Public Ministers.—The term "ambassadors and other public ministers," comprehends "all officers having diplomatic functions, whatever their title or designation."[494] It was originally assumed that such offices were established by the Constitution itself, by reference to the Law of Nations, with the consequence that appointments might be made to them whenever the appointing authority—the President and Senate—deemed desirable.[495] During the first sixty-five years of the Government, Congress passed no act purporting to create any diplomatic rank, the entire question of grades being left with the President. Indeed, during the administrations of Washington, Adams and Jefferson, and the first term of Madison, no mention occurs in any appropriation, even of ministers of a specified rank at this or that place, but the provision for the diplomatic corps consisted of so much money "for the expenses of foreign intercourse," to be expended at the discretion of the President. In Madison's second term, the practice was introduced of allocating special sums to the several foreign missions maintained by the Government, but even then the legislative provisions did not purport to curtail the discretion of the President in any way in the choice of diplomatic agents.

In 1814, however, when President Madison appointed, during a recess of the Senate, the Commissioners who negotiated the Treaty of Ghent, the theory on which the above legislation was based was drawn into question. Inasmuch, it was argued, as these offices had

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[491] 539 U.S. at 419 n.11.

[492] Justice Ginsburg's dissent in *Garamendi*, joined by the other three Justices, suggested limiting *Zschernig* in a manner generally consistent with Justice Souter's distinction. *Zschernig* preemption, Justice Ginsburg asserted, "resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involve[s] sitting in judgment on them.'" 539 U.S. at 439 (quoting Henkin, supra, at 164). But Justice Ginsburg also voiced more general misgivings about judges' becoming "the expositors of the Nation's foreign policy." Id. at 442. In this context, see Goldsmith, supra, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[493] United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

[494] 7 Ops. Atty. Gen. 168 (1855).

[495] It was so assumed by Senator William Maclay. THE JOURNAL OF WILLIAM MACLAY 109–10 (E. Maclay ed., 1890).