state constitutions may be constrained by operation of Clause 2.[83] Three Justices elaborated on this view in *Bush v. Gore*,[84] but the Court ended the litigation—and the recount—on the basis of an equal protection interpretation, without ruling on the Article II argument.

### Constitutional Status of Electors

Dealing with the question of the constitutional status of the electors, the Court said in 1890: "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress. . . . In accord with the provisions of the Constitution, Congress has determined the time as of which the number of electors shall be ascertained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them." [85] The truth of the matter is that the electors are not "officers" at all, by the usual tests of office.[86] They have neither tenure nor salary, and having performed their single function they cease to exist as electors.

This function is, moreover, "a federal function," [87] because electors' capacity to perform results from no power which was originally resident in the states, but instead springs directly from the Constitution of the United States.[88]

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[83] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam) (remanding for clarification as to whether the Florida Supreme Court "saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2").

[84] Bush v. Gore, 531 U.S. 98, 111 (2000) (opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas). Relying in part on dictum in McPherson v. Blacker, 146 U.S. 1, 27 (1892), the three Justices reasoned that, because Article II confers the authority on a particular branch of state government (the legislature) rather than on a state generally, the customary rule requiring deference to state court interpretations of state law is not fully operative, and the Supreme Court "must ensure that postelection state-court actions do not frustrate" the legislature's policy as expressed in the applicable statute. 531 U.S. at 113.

[85] *In re* Green, 134 U.S. 377, 379–80 (1890).

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

[87] Hawke v. Smith, 253 U.S. 221 (1920).

[88] Burroughs and Cannon v. United States, 290 U.S. 534, 535 (1934).