Governor Kean has demonstrated an almost non-Republican penchant for innovation in his appointments of justices to the New Jersey Supreme Court. First, he appointed the state’s initial woman justice, Marie Garibaldi. Now, he has nominated Gary Stein, his director of policy and planning, to the Court. In some ways this selection was even more out of the ordinary than that of Justice Garibaldi. Since judges — and above all Republican judges — are supposed to stick to the law and not make social policy, governors rarely, if ever, appoint their policy advisers directly to the bench.

Liberal Democrat Brendan Byrne’s appointments typify the more usual pattern. His nominees to the state’s highest court included three men — Stewart Pollock, Alan Handler, and Daniel O’Hern — who were serving as the Governor’s counsel (i.e., his chief legal adviser) at the time of their appointments. Byrne also appointed a practicing attorney, Robert Wilenz, as Chief Justice. By contrast, he never nominated any of his cabinet officers or any of his policy advisers directly to the Court, even though several of them — James Sheeran and Stanley Van Ness, for example — were attorneys who had the 10 years of experience constitutionally required of a Supreme Court nominee.

In this context, the Stein nomination is somewhat of a departure from traditional appointment practice. It raises some interesting questions for the future should other governors follow the same pattern. For example, how would an attorney who served in a policy-making position deal with the interpretation of statutes which he or she helped develop and administer? There would undoubtedly be a gain in expertise and feel for the policy behind the statute. But this very involvement could result in a loss of objectivity and detachment. The roles of advocate, administrator, and judge are distinct, and the transition between them may not be easy to make.

The Stein nomination may involve these issues. The future justice has had an important role in coordinating the administration’s response to the Mount Laurel II decision. It is well-known that this response had been something less than a whole-hearted endorsement. This raises a question. Will Stein’s service to a Governor who equated the Mount Laurel II opinion with “communism” lead him to dissent from the Court’s present consensus in favor of strong judicial enforcement of this doctrine? In other words, how will his experience as a policy-maker influence his decisions as a judge?

Whatever the answers to these questions, it is far too early to state that Governor Kean has started a trend toward appointment of policy advisers to the Court. The present Court is relatively young. Another 10 years may pass before there is another vacancy to fill. Thus, we may be several governors down the road before another appointment is made.

The situation calls to mind the term of Governor Richard J. Hughes, who never got to appoint a single Supreme Court justice, even though he was elected and re-elected to the governorship. The seven-member bench may again go through a long period of stability. Therefore, the Stein nomination does not herald any immediate movement toward a new kind of appointment.

There is one other aspect of the appointment that is almost unusual in its lack of novelty. If Stein is confirmed, the Court will consist entirely of justices who were not sitting judges at the time of their ascension to the high bench. In fact, only one justice, Alan Handler, will have had prior judicial experience at all. The once-strong tradition of promoting lower court judges, especially Appellate Division judges, to the Supreme Court has been completely shattered.

It may be that this decade-old change of direction has resulted simply from the personal preferences of Governors Byrne and Kean, who, with the Stein appointment, will have filled six of the Court’s seven seats. (Justice Robert Clifford was an appointee of Governor William T. Cahill.) There may, however, be some institutional factors at work here.

Because of increased caseload, there are many more Appellate Division judges now than there were during the first 20 years following creation of the present court structure as part of the 1947 constitutional change. It may be more difficult for individual Appellate Division judges to stand out as being particularly compelling candidates for promotion to the Supreme Court. The burgeoning case pressures also prevent Appellate Division judges from having the time to write detailed, comprehensive opinions which might attract the attention of a Governor. This factor, too, would make them less likely candidates for promotion.

This is admittedly speculation. It is hard to believe, however, that Governor Byrne, a former judge himself, and Governor Kean would have departed from tradition so greatly just because of personal predilections. It seems likely that the lower visibility of the Appellate Division played some role.

If so, the result would be unfortunate. There should be a place on the Supreme Court, our highest appellate court, for individuals with prior experience in hearing appeals. This is a topic that both the judicial and executive branches would do well to address before vacancies on the Supreme Court again become available.