This paper takes up the puzzle of the retreat of obligations. For much of the past fifty years, the practical importance of the law of obligations has been in decline across the common law world, as the things it does has increasingly been absorbed by public law, and by bodies associated with the administrative state. Virtually every thing that private law theorists treat as being the distinctive features of the law of obligations – be that vindicating rights, achieving economic efficiency, or dispensing corrective justice – can now be done through the ordinary functioning of regulatory and administrative bodies, and frequently is. Similarly, the content of private law duties too are now often determined by the shape of the surrounding regulatory framework, rather than the concerns that one finds in theoretical accounts of private law.

The paper presents an account of the various substantive and procedural changes that have marked the retreat of the law of obligations. It argues that it is associated with a significant shift in the law of obligations over the past century, from what I term a ‘socially embedded’ approach towards a more ‘managerial’ approach, focused on facilitating the deployment of effective risk-management strategies. I illustrate the nature and significance of the difference between these two modes with reference to duties of care in negligence, drawing principally upon the Caparo approach but also on US and Australian case law, and demonstrate that the rise of the managerial approach accounts for many of the recent changes that have been seen not just in the law of negligence, but more generally across the law of obligations.

Is this trend a good one? Should it be reversed? This paper argues that answering these questions requires us to bring the state back into private law, by putting the law of obligations back in its social and political context, and viewing it as a key part of the constitutional institutions of a common law polity. Seen from this perspective, the rise of regulation and of the managerial approach can be seen to have had a number of positive effects; but also have important limits. Drawing on the Scandinavian realists, the paper argues that taking the socially embedded approach seriously has the potential to overcome many of the tensions and dichotomies – between principle and policy, responsibility and distribution, the political and the universal – that currently afflict obligations theory.