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# Swiss Legal History in a (very small) Nutshell

Introduction into Swiss Law

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## Introduction

- Three elements in particular defining for present Swiss Legal Culture
  - Plurality
    - Cantons and cantonal legal cultures (with tendency towards more or less three regions: Western, Eastern, and Southern region)
    - Legal traditions and their impact (Roman and common law, Austrian, French, and German law, ecclesiastical law)
  - Coordination and Mediation of plurality
    - Swiss nation as *Willensnation* (“nation of consensus about being a nation even though there are different cultures existing”)
    - Strong presence of popular sovereignty as means to bring an end to open political conflicts
    - Legal rules as *media* and result of these coordinative and mediating efforts
  - Presence of international legal order (as opposition or openness)



## Introduction (2)

- These elements developed in the course of Swiss confederate (legal) history and shall be discussed here
- Two larger periods
  - Old confederacy (13<sup>th</sup>/14<sup>th</sup> century-1798)
  - Emergence and rise of modern constitutional statehood and, since late 19<sup>th</sup> century, modern welfare state (with strong inclination to self-regulation)
- Following section along these periodization
  - Old confederacy with importance of covenants as means of autonomous rule making, together with customary and partially also decrees, issued in a top-down mode
  - Modern state with importance of constitutions, codifications and unity in the application of law



# THE OLD CONFEDERACY (13<sup>TH</sup> CENTURY – 1798)

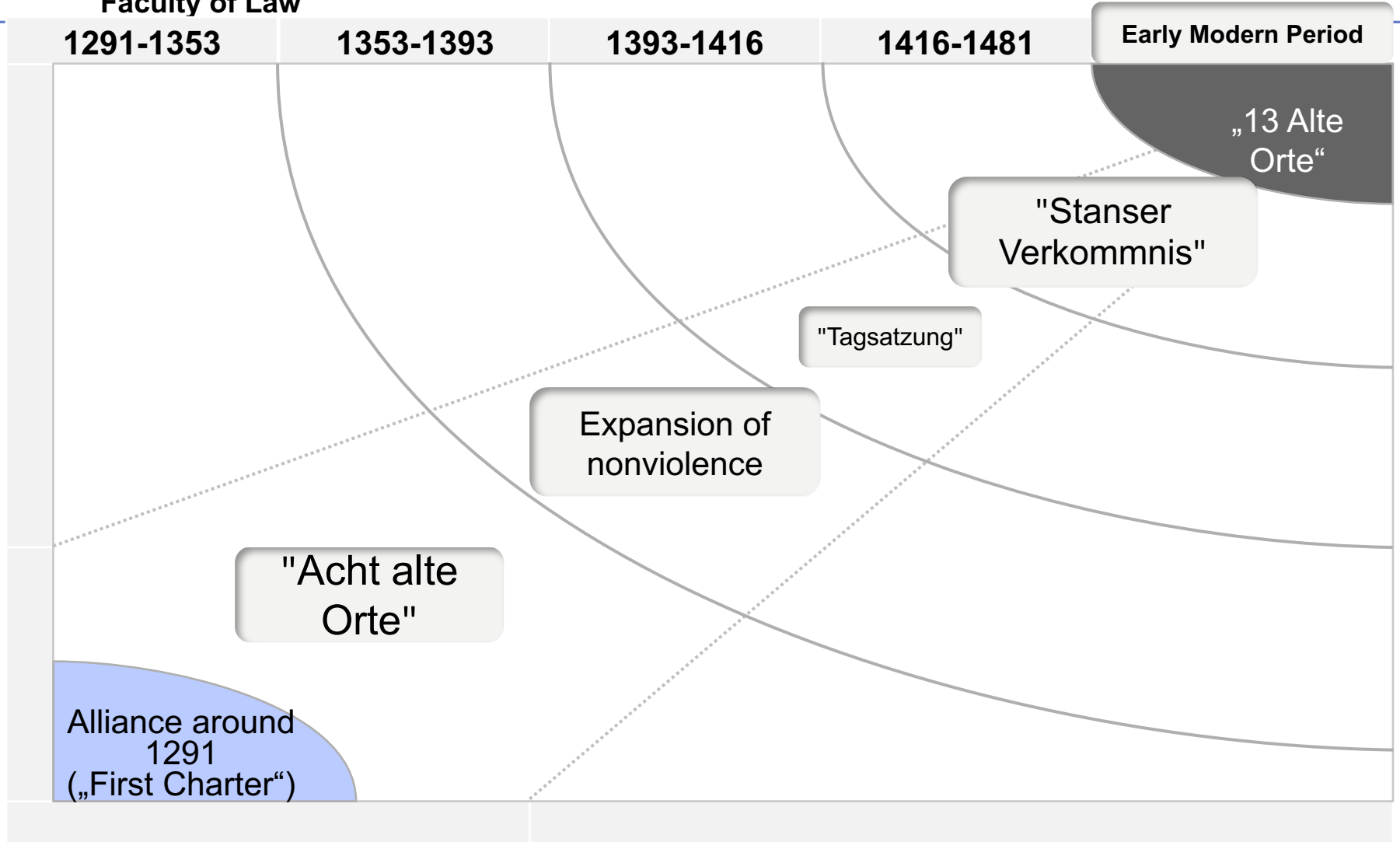


## **Coniuratio, Covenant, and Charters: Emergence and Formation of the Old Confederacy**

- Federal State of Switzerland by officially named
  - *Confédération suisse/Confederazione Svizzera/Confederaziun svizra*
  - *Schweizerische Eidgenossenschaft*
  - Note: “Eidgenossenschaft” comprises
    - “Eid” = oath
    - Genossenschaft = *Association*
  - In particular German name keeps historical memory about
    - importance of confederate structures (n. b.: same in the preamble with the statement of the Swiss people *and* Cantons as being *resolved to renew their alliance*)
    - Emergence of Swiss statehood as result of an “alliance” of cantons
- These alliances formed the fundament of Swiss Confederacy since the 13<sup>th</sup> century...



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# Charters between „Orten“ and the Swiss Confederacy in the Late Middle Ages



Public Peace  
alliance between  
Uri, Schwyz and  
Nidwalden ("Erster  
Bundesbrief"/"First  
Charter")



Convention between  
Uri, Schwyz,  
Unterwalden,  
Luzern, Zürich and  
Zug: prohibition of  
feud, exclusion of  
ecclesiastical courts  
(tendency of  
territorialisation)



Confederation between  
Uri, Schwyz,  
Unterwalden, Luzern,  
Zürich, Glarus, Zug  
and Bern as well as  
Solothurn: prohibition  
of violence between  
the confederates,  
peace between  
confederal partners  
during military  
expeditions, prohibition  
of military expeditions  
as solo actions.



Confederation  
between Uri, Schwyz,  
Unterwalden, Luzern,  
Zürich, Glarus, Zug  
and Bern, as well as  
Freiburg and  
Solothurn: Affirmation  
of the old letters  
(„Briefe"); obligation  
to support each other  
(also in times of  
revolts), obligation to  
common warfare.



## Coniuratio as tool of law making

- These development points to the importance of *coniuratio* (i. e. *sworn union*) as means of legal action
- *Coniuratio*
  - Frequently used means of establishing
    - Public peace
    - Associations (as means of securing public peace)
    - Legal rules
  - Emergence all over medieval Europe on several levels
    - Over regional level as in Switzerland – in the early modern period combined with the idea of republican governmental order, e. g. Netherlands, 1579
    - Municipal level as fundament of legal order, particularly in autonomous cities as, e. g., Zurich (more or less autonomous since the 13<sup>th</sup> century) with the so called “Richtebrief” (1<sup>st</sup> charter preserved from 1304) – legal rules, their validity being based on a pledge of allegiance





Federal Charter 1291 (excerpt): ...

Thus, all people of the valley community of Uri, the entirety of the Schwyz valley and the community of people from the lower Unterwalden valley recognise the malice of the times and for their own protection and preservation they have promised to assist each other by every means possible with every counsel and favour, with persons or goods within their valleys and without against any and all who inflict on them or any among them acts of violence or injustice against persons or goods.

And each community has solemnly sworn to universally succour the others at its own expense in order to withstand and avenge malicious attacks and wrongdoings. They have thereby renewed the old oath of association, yet in such a manner that every man shall serve his overlord as it behoves him according to his estate.



## Records of law (Offnungen), Mandates and a little bit legislation

- Beyond these strong organizing power of *coniuratio* other legal sources on cantonal and municipal level
  - Customary law (unwritten law)
    - Written records of customary law – sometimes produced in a kind of legal procedure
      - By peasants and their lords
      - Between free peasants
      - Between different lords
    - As “law of the land”/”law of the city” (*coutumes générales* in the West, *Statuti* in the South), e. g. *Statuta Patriae Vallesii* in canton Valais 1571
  - Mandates since the 16<sup>th</sup> century: Decrees by public authorities as city councils with strong emphasis on discipline and overall regulatory order



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# **THE RISE OF THE MODERN STATE SINCE 1798**

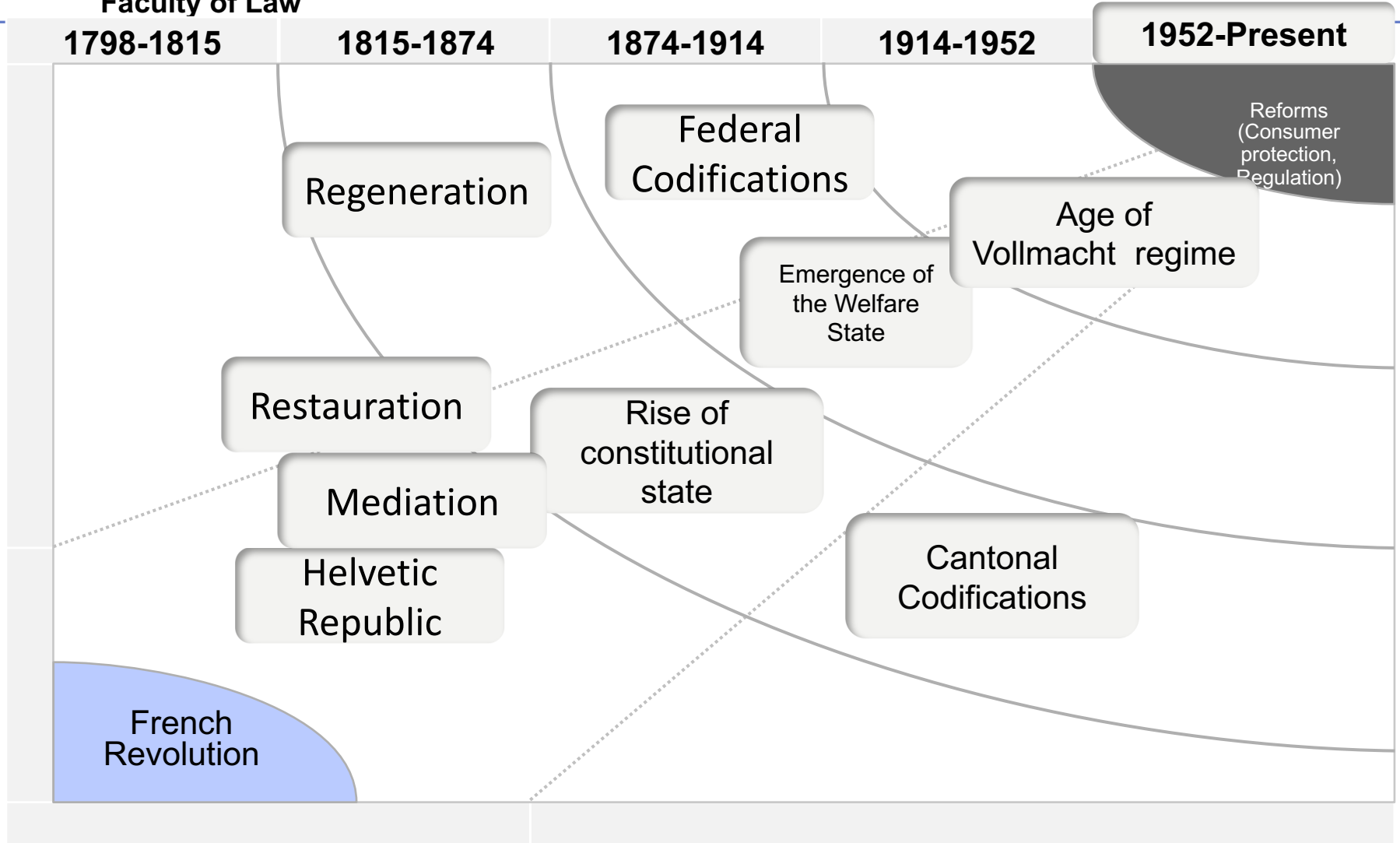


## Defining Elements of Swiss Legal Culture

- Since French Revolution in Europe and thus also in Switzerland: Rise of constitutionalism – Constitution as legal order for government and political power
- Since around the last third of the 19<sup>th</sup> century: Rise of interventionist welfare state
  - Social security
  - Emergence of public services in transportation and energy
  - Rising importance of taxation (including social taxes), particularly income taxation, as means of redistribution of wealth
  - Interventionist state action in order to regulate market forces, rise of regulatory regimes
- Two main devices of governmental power
  - Legislation and codification
  - Professionalized administration
- These developments are highly visible in Swiss legal history since late 19<sup>th</sup> century – except for the rise of regulatory regimes (instead: self regulation)

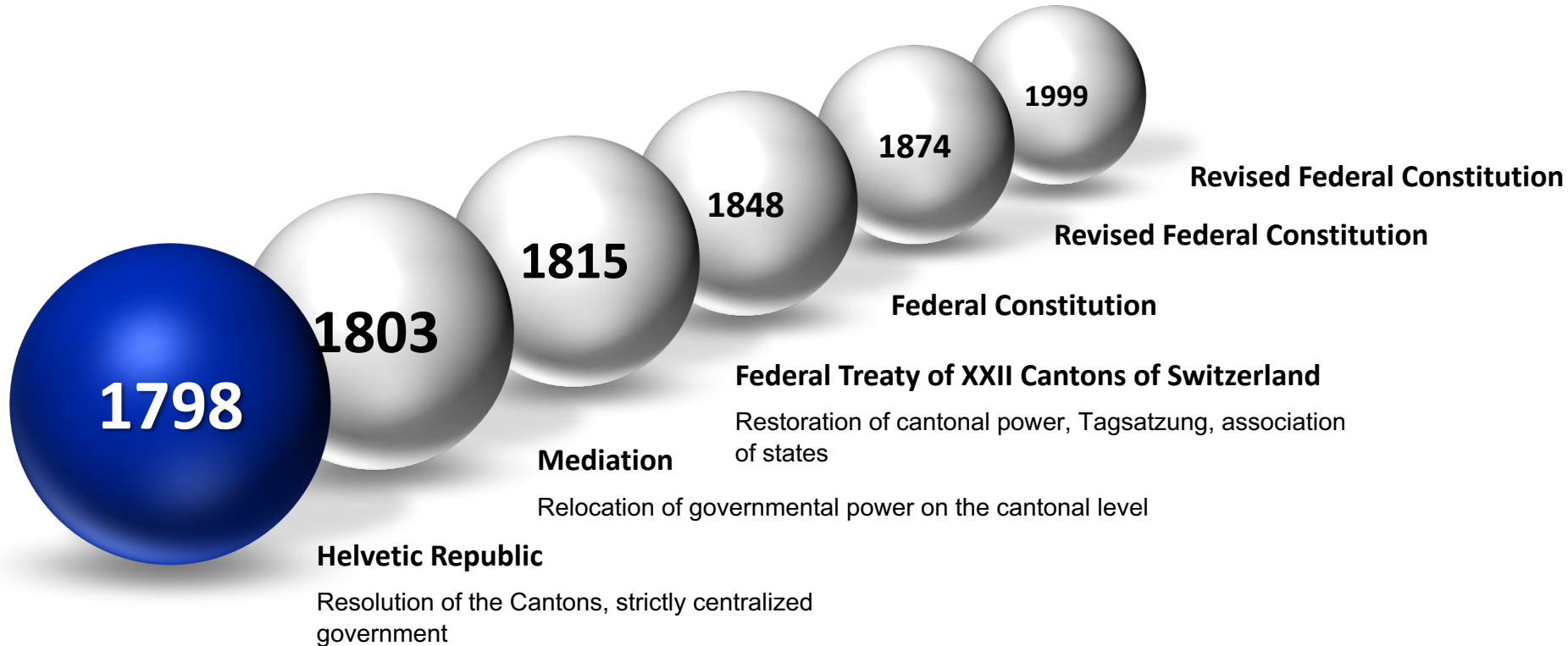


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# The Emergence of the Swiss Federal Constitutional State since the late 18<sup>th</sup> Century





## The Rise of Codifications

- Two stages of codificatory development
  - Cantonal Codifications since the beginning 19<sup>th</sup> century, for example
    - *Codice penale della repubblica e cantone del Ticino* 1816
    - *Zurich Privatrechtliches Gesetzbuch* 1853-1855
  - Federal Codifications
    - Only after 1874 due to weak federal legislative power in former constitutional order
    - Main codifications
      - *Obligationenrecht* 1881/1911
      - *Zivilgesetzbuch* 1907
      - *Strafgesetzbuch* 1937 (1942)



## Codifications and the Internationalization of Swiss Law

- Codifications both on cantonal as federal level
  - not (only) as creation of new legal concepts
  - Rather as bundling of different conceptual approaches, as already laid out in other regions and cultures
  - Exception: Zivilgesetzbuch with strong importance of domestic regional traditions as collected by Eugen Huber
- As a consequence: Influence of foreign legal ideas, in particular
  - Roman Law tradition (mediated via Savigny, Keller, Bluntschli)
  - Austrian civil and penal codes
  - French civil and penal codes





# CONCLUSIONS



## Conclusions

History of Swiss Legal Tradition indicate

- Broad tradition of autonomous making of law by means of *coniuratio* and similar means – idea of corporate self-determination
  - Federal Charters
  - Legal development in the “Orte”
- Strong continuity of regional autonomy as embodied by cantons and municipalities
  - Failure of Helvetic Republic
  - Cantonal Codifications as forerunner of federal codifications
- Modern tendencies towards legal unity with process of tentative federal codification and nowadays legislation
- Strong impact of foreign legal cultures (tendencies of internationalization and globalization of Swiss law)



## Bibliography

- René Pahud de Mortanges, Schweizerische Rechtsgeschichte, 2. Auflage 2017 (RWI: Gda 26:2/BASIS Cc18:2 Ed)
- Historisches Lexikon der Schweiz (also in French and Italian), online: <http://www.hls-dhs-dss.ch/index.php>
- The Anthology of Swiss Legal Culture, in English, collection of important texts, online: <http://www.legalanthology.ch/>