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 (13th/14th century-1798)
  - Emergence and rise of modern constitutional statehood and, since late 19th 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 (13TH 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 13th century…

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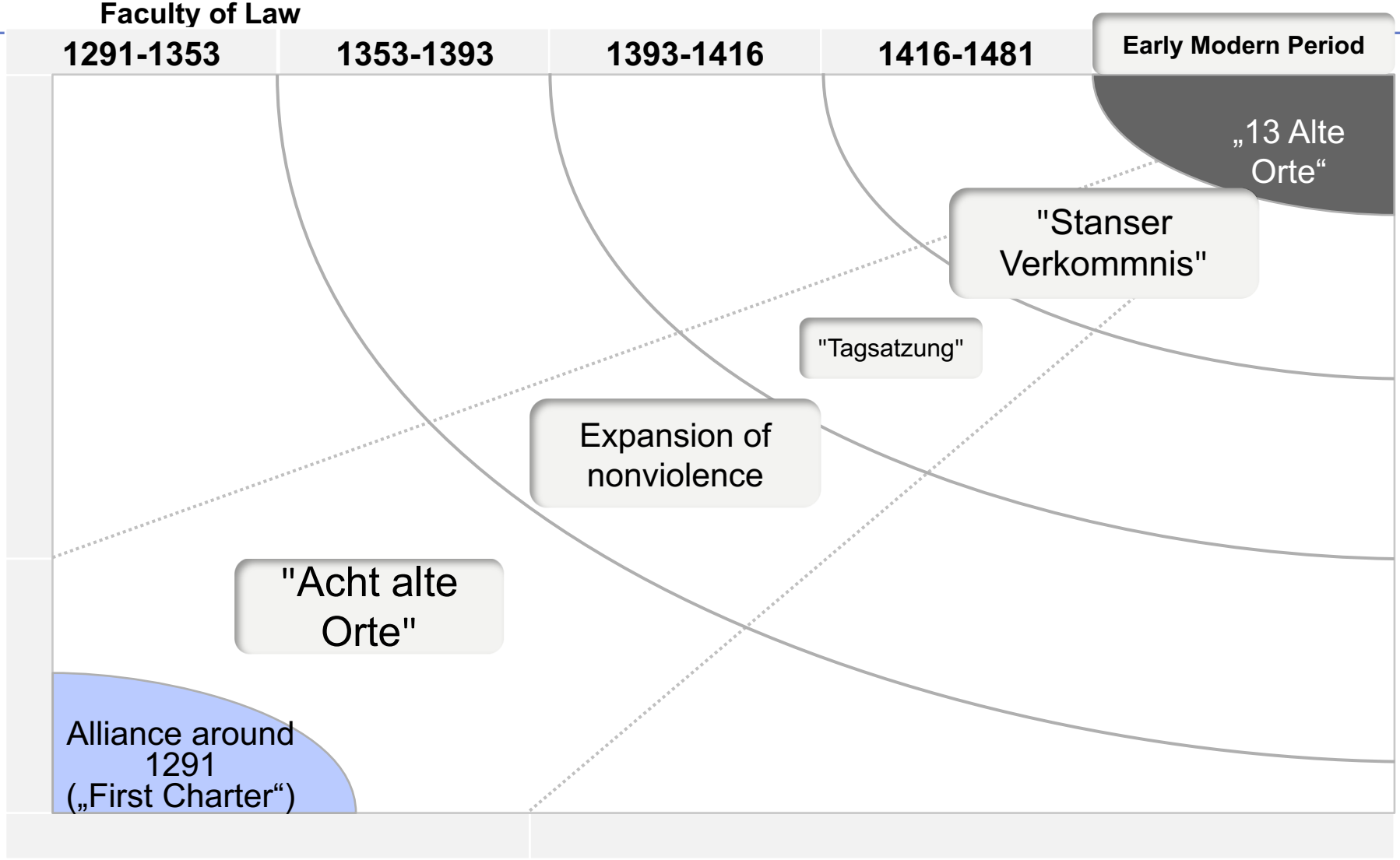
Stages of development in medieval Swiss Confederation



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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 territorialisiation)

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.

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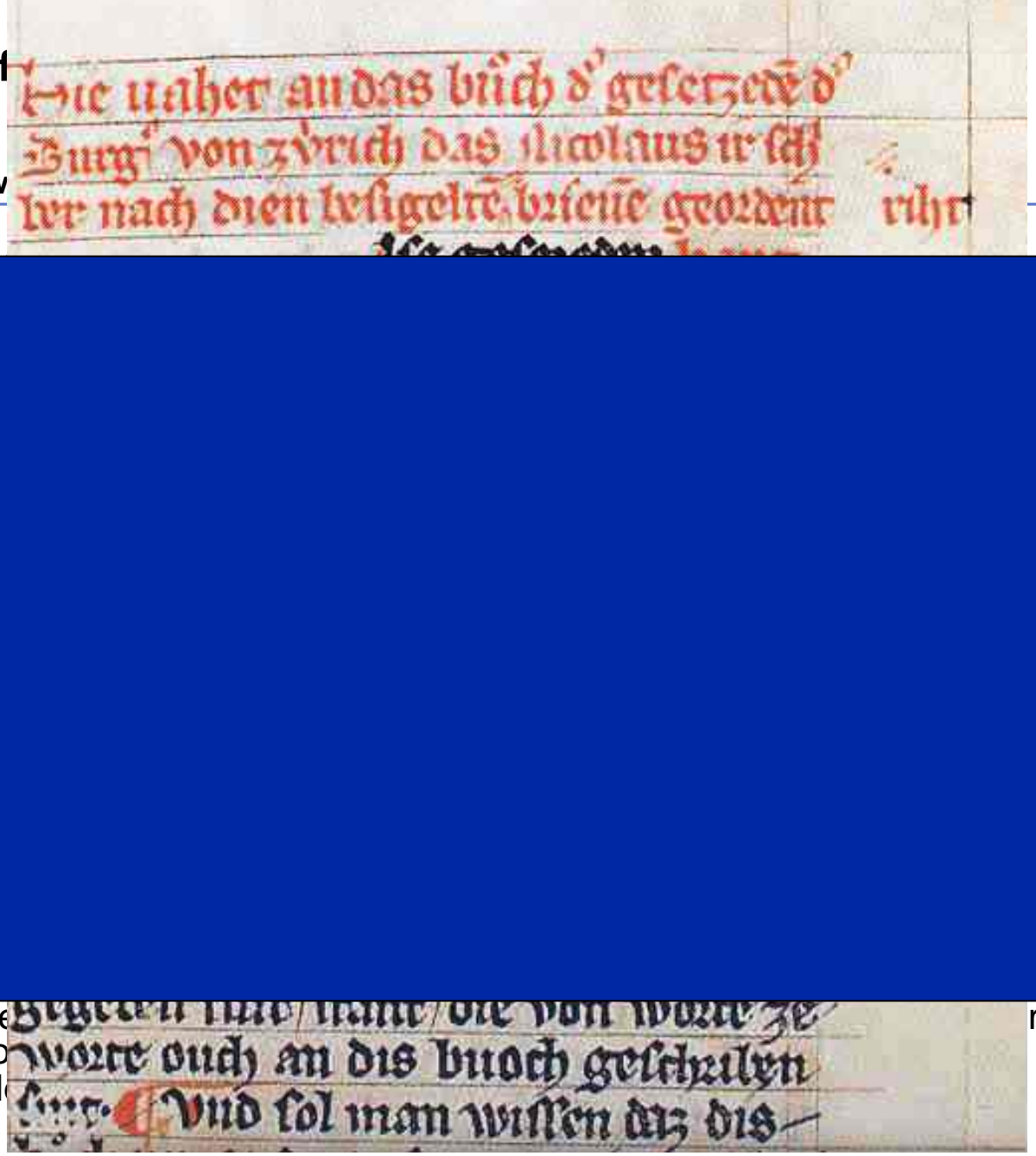

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Federal Charter 1291 (excerpt): …

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 16th century: Decrees by public authorities as city councils with strong emphasis on discipline and overall regulatory order

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 19th 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 19th century – except for the rise of regulatory regimes (instead: self regulation)

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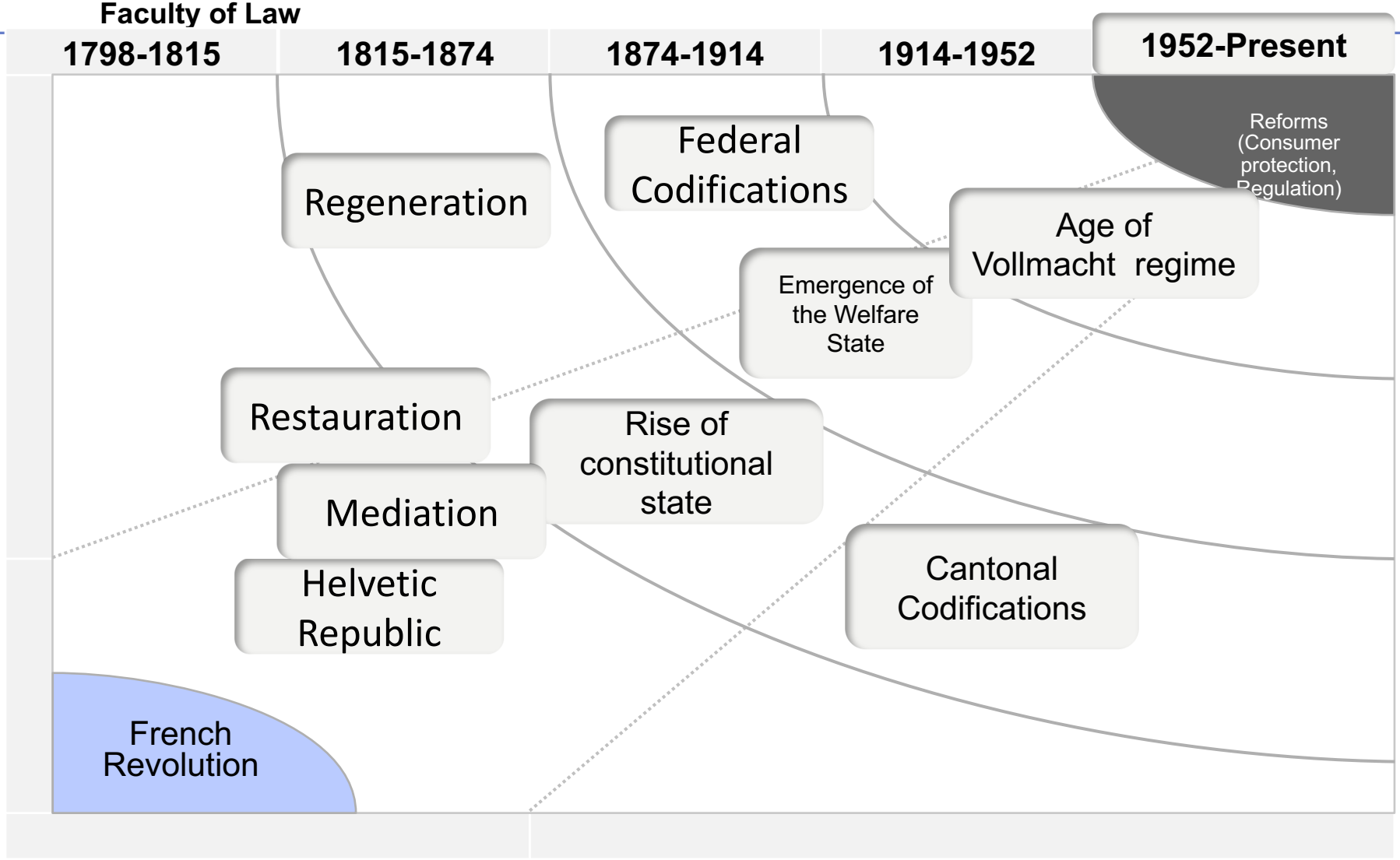
Stages of legal Order in Switzerland since 1798



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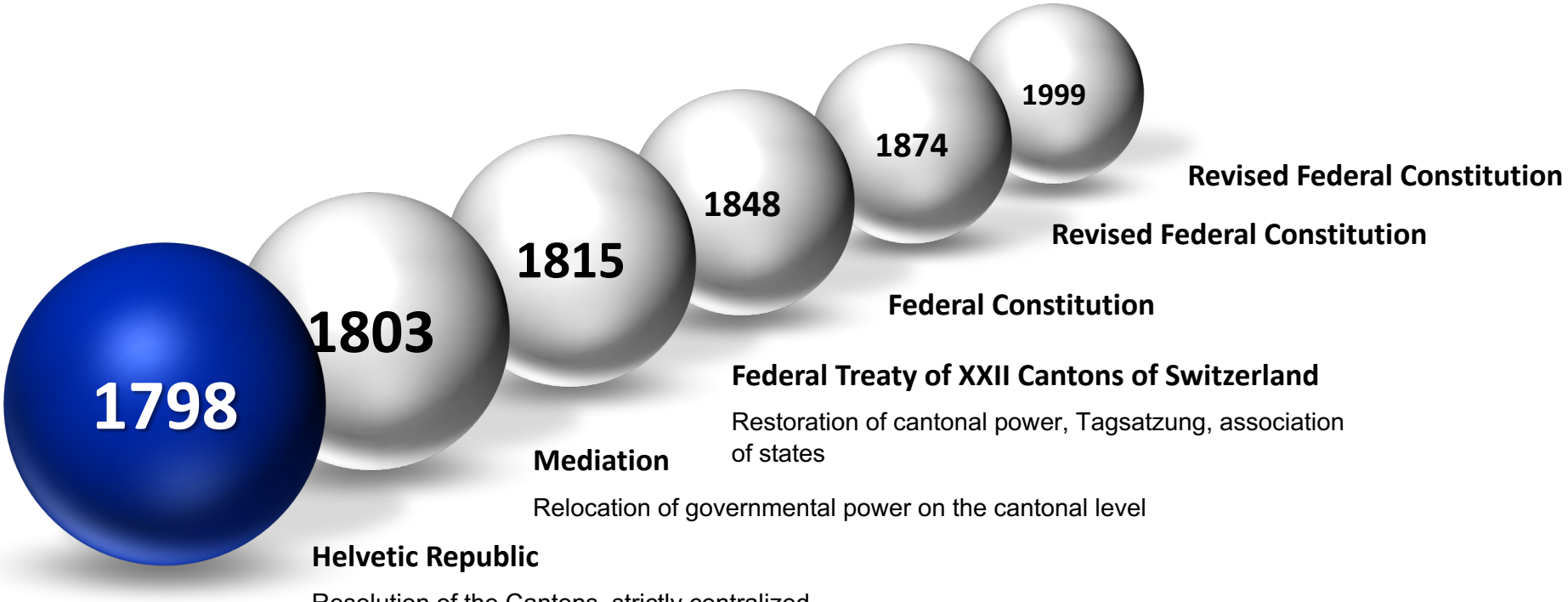
The Emergence of the Swiss Federal Constitional State since the late 18th Century



The Rise of Codifications

- Two stages of codificatory development
  - Cantonal Codifications since the beginning 19th century, for example
    - *Codice penale della republica e cantone del Ticino* 1816
    - Zurich *Privatrechtliches Gesetzbuch* 1853-1855
  - Federal Codifications
    - Only after 1874 due to weak federal legislatory 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/