Chapter 1 analyzed some important aspects of Schmitt’s theory, the critiques of Schmitt in China and how Schmitt can potentially be of benefit to Chinese liberalism. This chapter explores Schmitt’s critique of the positivist understanding of law in a detailed and systematic way. In this critique, Hans Kelsen’s legal theory is Schmitt’s main target. Schmitt’s critique is mainly conducted from two perspectives: the founding and protecting moments of a constitutional order. Schmitt’s critique of the positivist understanding of law, therefore, contributes to the understanding of the relationship between law and political power or political authority in the politics of transition. ‘Political power’ and ‘political authority’ are interchangeable in this context.

There have been many studies of the theoretical relationship between Schmitt and Kelsen. In the conventional approach to the interpretation of their theories, Schmitt and Kelsen stand in opposition to each other. Take Peter C. Caldwell, for example. He is one of those scholars who take a conventional view of this relationship. Caldwell argues that Kelsen and Schmitt were ‘the antipodes of Weimar constitutional theory.’ Kelsen is defined as the ‘main enemy’
of Schmitt. In contrast to the conventional approach, Kalyvas instead ‘seeks to show how the former [Schmitt] supplements and complements the latter [Kelsen].’ Both the conventional approach and Kalyvas’s supplementary approach, however, merely focus on the relationship between law, state, norm and political will. Neither tries to explore the deeper reason behind Schmitt’s critique of Kelsen. In contrast to both these approaches, I argue that the fundamental division between Schmitt and Kelsen is their different conceptions of the relationship of the individual and the state.

There are five sections in this chapter. Kelsen’s views about law and political power and his theory of the basic norm and the identity of state and law are discussed in the first section. This discussion will be helpful for understanding Schmitt’s critique of Kelsen in later sections. The second section explores Schmitt’s critique of Kelsen’s theory of the basic norm. In its essence, it generally reveals Schmitt’s construction of the relationship of law and political authority from the perspective of the founding moment of a legal order. The third section focuses on Schmitt’s critique of the identity of state and law. It shows Schmitt’s understanding of law’s relationship to political power from the perspective of the protecting moment of a constitutional order. Schmitt’s two critiques of Kelsen reconstruct the relationships between law and political power, law and state, and legality and legitimacy.

The fourth section puts Schmitt’s critique in a broader theoretical framework that will be helpful for understanding the deeper foundation of Schmitt’s critique of Kelsen. This framework will show that Kelsen is in line with liberals who Schmitt thinks undermine the authority of the state, while Schmitt aims to recover political authority and the unity of the state that appeared in Hobbes’s political philosophy. The fundamental difference between Schmitt and Kelsen, therefore, is in their different conceptions of the relationship of state and individual. Then follows the conclusion.

2.1 The positivist understanding of the relationship between law and political power: Kelsen as an extreme example

Kelsen’s legal philosophy represents an extreme example that excludes the state and its sovereignty as independent political elements from